INTERPRETATION OF THE CONVENTION REFUGEE DEFINITION IN THE CASE LAW

Legal Services
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CHAPTER 1

1. INTRODUCTION

1.1. FOREWORD

This paper discusses the definition of Convention refugee,[1] which was incorporated into Canadian law by section 2(1) of the *Immigration Act*.[2]

The interpretation of the Convention refugee definition is an ongoing process, of which the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB) is a major player, it being the body in Canada which adjudicates claims in the first instance. Some issues have been settled by the Courts, many others remain unanswered. One of the difficulties in summarizing the basic principles in this area of the law is that many of the Court decisions are fact specific and do not establish general principles of law. We have also identified those areas in which the case law is conflicting or unsettled.

In this paper, we have attempted to identify those principles of law which are settled and to indicate how the Courts have applied those principles to some particular situations. In reading the cases themselves, we caution keeping in mind the need to distinguish between a case that sets out a legal principle and a case that applies the law to particular facts.

Reference will be made to the decisions of the Federal Court and Supreme Court of Canada which interpret the Convention refugee definition. Foreign case law and CRDD decisions are not generally included in this paper. Where applicable, reference is also made to the UNHCR Handbook,[3] and to the relevant IRB Legal Services Commentaries, Preferred Position Papers and Chairperson's Guidelines issued by the IRB.

Case law on credibility and evidence can be found in the IRB Legal Services papers "*Assessment of Credibility in the Context of CRDD Hearings*", dated May 30, 1996, and *"Weighing Evidence"*, dated December 15, 1997, available from the IRB's web site <www.irb.gc.ca>.

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[1] 1951 *Convention Relating to the Status of Refugees*, 189 U.N.T.S. 2545, entered into force on April 22, 1954 and the 1967 *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 8791, entered into force on October 4, 1967.

[2] R.S.C. 1985 (4th Supp.) c.28, s.1, and s.2(1.1) enacted by S.C. 1992, c.49, s.1.

[3] Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, January 1992.

1.2. EXPLANATORY NOTES

(1) References to "the Court of Appeal" are references to the Federal Court of Appeal. Similarly, references to "the Trial Division" are references to the Federal Court - Trial Division.

(2) Each chapter includes a list, in alphabetical order, of all the cases referred to in the chapter, with appropriate page references.

(3) In order to facilitate searching for cases in the various IRB Legal Services libraries, we have adopted the following practice. For cases reported in reporting series such as the *Immigration Law Reporter (Imm. L.R.)*, the *Dominion Law Reports (D.L.R.)*, or the *National Reporter (N.R.)*, we have included the unreported citation as well. However, since all the offices subscribe to the *Federal Court Reports (F.C.R.)* and the *Supreme Court Reports (S.C.R.)*, the unreported citation is not included for cases reported in these two reporting series.

For example, *Ward* is reported in the Supreme Court Reports, the Dominion Law Reports and the Immigration Law Reporter, therefore, the citation for this case will read:

> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th), 1, 20 Imm. L.R. (2d) 85.

Valentin is reported in the Federal Court Reports, therefore, the citation for this case will read:

> *Valentin v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 390 (C.A.)

Villafranca is reported in the Immigration Law Reporter, therefore the citation for this case will read:

> *M.E.I. v. Villafranca, Ignacio* (F.C.A., no. A-69-90), Marceau, Hugessen, Décary, December 18, 1992. Reported: *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.).

(5) Note that when citing a case in reasons, only the reported citation should be used.

1.3. CONVENTION REFUGEE DEFINITION (as enacted by R.S.C. 1985 (4th Supp.), c.28, s.1 and amended by S.C. 1992, c.49)

1.3.1. *Immigration Act,* Section 2(1) - meaning of "Convention refugee"

"Convention refugee" means any person who

(*a*) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or

(ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and

(*b*) has not ceased to be a Convention refugee by virtue of subsection (2),

but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act.

1.3.2. *Immigration Act,* Sections 2(2) and 2(3) - cessation of refugee status

(2) A person ceases to be a Convention refugee when

(*a*) the person voluntarily reavails himself of the protection of the country of the person's nationality;

(*b*) the person voluntarily reacquires his nationality;

(*c*) the person acquires a new nationality and enjoys the protection of the country of that new nationality;

(*d*) the person voluntarily re-establishes himself in the county that the person left, or outside of which the person remained, by reason of fear of persecution; or

(*e*) the reasons for the person's fear of persecution in the country that the person left, or outside of which the person remained, cease to exist.

(3) A person does not cease to be a Convention refugee by virtue of paragraph (2)(e) if the person establishes that there are compelling reasons arising out of any previous persecution for refusing to avail himself of the protection of the country that the person left, or outside of which the person remained, by reason of fear of persecution.

1.3.3. *Immigration Act*, Section 2(1.1) - multiple nationalities

(1.1) For the purposes of the definition "Convention Refugee" in subsection (1), where a person has more than one nationality, all references to the person's nationality in that definition shall be construed as applying to each of the countries of which the person is a national.

1.3.4. Schedule to the *Immigration Act* - exclusion clauses

SECTIONS E AND F OF ARTICLE 1 OF THE UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(*a*) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

(*c*) he has been guilty of acts contrary to the purposes and principles of the United Nations.

1.4. GENERAL RULES OF INTERPRETATION

The Supreme Court of Canada has dealt with very few refugee cases, however, a case which raised a number of important issues and provided the Court with the opportunity to offer its unanimous interpretation of the definition of Convention refugee was *Canada (Attorney General) v. Ward*.[4] While the Court did not deal with every aspect of the definition (for example, it did not deal with the exclusion clauses[5]), it did provide us with a general framework of interpretation of its major components. The Court also commented extensively on the context in which refugee determination takes place and on the nature of Canada's international obligations in this respect.

The following are the general principles enunciated in *Ward*.[6]

1.4.1. Surrogate Protection

The rationale underlying the international refugee protection system is that national protection takes precedence over international protection. This "surrogate" or "substitute" protection will only come into play in certain situations where national protection is unavailable.[7] The burden is on the claimant to establish a well-founded fear of persecution in all countries of which the claimant is a citizen.[8]

1.4.2. Fear of Persecution For A Convention Reason

Inability of a state to protect its citizens will not be sufficient to engage international protection obligations. There must also be a fear of persecution for a Convention ground.

> ... the international role was qualified by built-in limitations. These restricting mechanisms reflect the fact that the international community did not intend to offer a haven for all suffering individuals. The need for "persecution" in order to warrant international protection, for example, results in the exclusion of such pleas as those of economic migrants, i.e., individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance, although both of these cases might seem deserving of international sanctuary.[9]

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[4] *Ward: Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85.

[5] The Supreme Court of Canada has more recently dealt with the issue of exclusion under Article 1 F(c) in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; (1998), 43 Imm. L.R. (2d) 117 (S.C.C.). For a discussion of all exclusion issues see Chapter 10.

[6] Each principle will be discussed in more detail in later chapters of the paper.

[7] *Ward, supra*, footnote 4, at 709.

[8] *Ward, supra*, footnote 4, at 751.

[9] *Ward, supra*, footnote 4, at 731-732.

1.4.3. Two Presumptions At Play In Refugee Determination

Presumption 1: If the fear of persecution is credible (the Court uses the word "legitimate") and there is an absence of state protection, it is not a great leap "... to presume that persecution will be likely, and the fear well-founded."[10]

> Having established the existence of a fear and a state's inability to assuage those fears, it is not assuming too much to say that the fear is well-founded. Of course, the persecution must be real - the presumption cannot be built on fictional events - but the well-foundedness of the fear can be established through the use of such a presumption.[11]

Presumption 2: Except in situations where the state is in a state of complete breakdown, states must be presumed capable of protecting their citizens. This presumption can be rebutted by "clear and convincing" evidence of the state's inability to protect.[12]

> The danger that [presumption one] will operate too broadly is tempered by a requirement that clear and convincing proof of a state's inability to protect must be advanced.[13]

1.4.4. State Complicity Not Required

"Whether the claimant is 'unwilling' or 'unable' to avail him- or herself of the protection of a country of nationality,[14] state complicity in the persecution is irrelevant."[15]

> As long as [the] persecution is directed at the claimant on the basis of one of the enumerated grounds, I do not think the identity of the feared perpetrator of the persecution removes these cases from the scope of Canada's international obligations in this area.[16]

1.4.5. Existence Of Fear Of Persecution

State involvement in the persecution, however, "... is relevant ... in the determination of whether a fear of persecution exists."[17]

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[10] *Ward, supra*, footnote 4, at 722.

[11] *Ward, supra*, footnote 4, at 722.

[12] *Ward, supra*, footnote 4, at 725-726.

[13] *Ward, supra*, footnote 4, at 726.

[14] With respect to the meaning of the terms "unable", "unwilling" and "protection", the Supreme Court of Canada adopts an interpretation of the Convention refugee definition that is consistent with paragraphs 98, 99 and 100 of the UNHCR *Handbook*. See *Ward, supra*, footnote 4 at 718.

[15] *Ward, supra*, footnote 4, at 720.

[16] *Ward, supra*, footnote 4, at 726.

[17] *Ward, supra*, footnote 4, at 721.

1.4.6. Use Of Underlying Anti-Discrimination Law In Interpreting Particular Social Group

The Supreme Court of Canada, discussing the meaning of "particular social group" makes reference to the fact that "[u]nderlying the Convention is the international commitment to the assurance of basic human rights without discrimination."[18] The Court then quotes with approval from Goodwin-Gill[19] and Hathaway[20] and adopts the approach taken in international anti-discrimination law as an inspiration to interpreting the scope of the Convention grounds.[21]

> Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination ...
>
> This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates ...
>
> ... the enumeration of specific foundations upon which the fear of persecution may be based to qualify for international protection parallels the approach adopted in international anti-discrimination law...
>
> The manner in which groups are distinguished for the purposes of discrimination law can thus appropriately be imported into this area of refugee law.[22]

1.4.7. Broad and general interpretation of political opinion

The Supreme Court of Canada adopts the definition of political opinion offered by Goodwin Gill,[23] namely, "any opinion on any matter in which the machinery of the state, government, and policy may be engaged"[24] and adds two refinements: (1) that the political opinion at issue need not have been expressed outright;[25] and (2) that the political opinion ascribed to the claimant by the persecutor need not necessarily conform to the claimant's true beliefs.[26]

1.4.8. Examiner To Consider The Relevant Grounds

The Court refers with approval to paragraph 66 of the UNHCR *Handbook*, which states that it is not the duty of the claimant to identify the reasons for the persecution but for the

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[18] *Ward, supra*, footnote 4, at 733.

[19] Goodwin-Gill, Guy S., T*he Refugee in International Law,* (Oxford: Clarendon Press, 1983), p.38.

[20] Hathaway, James C., *The Law of Refugee Status*, (Toronto: Butterworths, 1991), pp. 104-105.

[21] *Ward, supra*, footnote 4, at 734.

[22] *Ward, supra*, footnote 4, at 733-5.

[23] *Supra*, footnote 19.

[24] *Ward, supra*, footnote 4, at 746.

[25] *Ward, supra,* footnote 4, at 746.

[26] *Ward, supra*, footntoe 4, at 747.

examiner to decide whether the Convention definition is met, having regard to all the grounds set out therein.[27]

1.4.9. Perception Of Persecutor

With respect to the ground "political opinion", the Court endorses the definition suggested by Goodwin-Gill, i.e., "any opinion on any matter in which the machinery of the state, government, and policy may be engaged" and adds two refinements:

a) "... the political opinion at issue need not have been expressed outright," it can be imputed to the claimant;[28]

b) "the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs". The issue must be approached from the perspective of the persecutor.[29]

The following are general principles established by cases other than *Ward*.

1.4.10. Section 7 Of The *Charter*

Given the seriousness of the consequences of a decision rendered by the Refugee Division and the nature of the rights conferred when Convention refugee status is granted, the principles of fundamental justice, as enshrined in section 7 of the *Canadian Charter of Rights and Freedoms*,[30] must be duly respected.[31]

> Given the potential consequences for the [claimants] of a denial of [Convention refugee] status if they are in fact persons with a "well-founded fear of persecution", it seems to me unthinkable that the *Charter* would not apply to entitle them to fundamental justice in the adjudication of their status.[32]

1.4.11. All Elements Of The Definition Must Be Met

To be determined a Convention refugee, a claimant must establish that he or she meets all the elements of the definition. Some aspects of the definition have not received judicial

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[27] *Ward, supra*, footnote 4, at 745.

[28] *Ward, supra*, footnote 4, at 746.

[29] *Ward, supra*, footnote 4, at 747.

[30] Section 7 provides that

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[31] *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, 17 D.L.R.(4th) 422, 58 N.R. 1.

[32] *Singh, ibid.*, at 210, per Wilson J.

interpretation. Where several interpretations are possible, one of the factors to consider in choosing the most appropriate one is the objective set out in section 3(g) of the *Immigration Act*.[33]

1.4.12. Personal Targeting Not Required

The claimant does not have to establish personal targeting or persecution or that he or she was persecuted in the past or will be persecuted in the future.[34]

1.4.13. Standard Of Proof Is "Reasonable or Serious Possibility"

The standard of proof in refugee claims is a "reasonable" or "serious possibility" that the claimant would be persecuted if he or she returned to the country of origin.[35]

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[33] Section 3(g) of the *Immigration Act* provides as follows:

> 3. It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need ...
>
> (g) to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted.

[34] *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 (C.A.) at 258.

[35] *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.) at 683.

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CHAPTER 2

2. COUNTRY OF PERSECUTION

2.1. COUNTRY OF NATIONALITY

The claimant must establish that he or she is a Convention refugee from the country of his nationality. In this context nationality means citizenship of a particular country.[1] If the claimant has a country of nationality, the claim should be assessed only against that country and not against some other country where the claimant may have residency status.[2]

2.1.1. Multiple Nationalities

If a claimant is a national of more than one country, the claimant must show that he or she is a Convention refugee with respect to all such countries.[3] A refugee claimant must thus prove that he or she has a well-founded fear of persecution in all countries of nationality before he or she can be conferred refugee status in Canada.[4] Consequently, the CRDD is not required to consider the fear of persecution in the second country of citizenship, once it has been determined that the claimant does not have a well-founded fear of persecution in the first.[5]

2.1.2. Establishing Nationality

Determining nationality is a question of fact.[6] Nationality can be established by examining the laws (constitution, citizenship legislation) and their interpretation (most authoritatively by officials of the relevant government) and the state practice of the country in question.[7] Possession

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1 *Hanukashvili, Valeri v. M.C.I.* (F.C.T.D., no. IMM-1732-96), Pinard, March 27, 1997.

2 *Hurt v. Canada (Minister of Manpower and Immigration)*, [1978] 2 F.C. 340 (C.A.); *Mensah-Bonsu, Mike Kwaku v. M.E.I.* (F.C.T.D., no. IMM-919-93), Denault, May 5, 1994. This is subject to a possible exclusion issue arising under Article 1E of the Convention (see Chapter 10, section 10.1.). In *Sayar, Ahmad Shah v. M.C.I.* (F.C.T.D., no. IMM-2178-98), Sharlow, April 6, 1999, the Court held that since the CRDD found that the claimant was excluded under Article 1E, it did not need to determine whether he had a well-founded fear of persecution in his country of citizenship.

3 The impact of "multiple nationalities" on the definition is addressed in section 2(1.1) of the *Immigration Act*, as enacted by S.C. 1992, c.49, s.1. This provision, which was added to the *Act* in 1993, is consistent with the interpretation of the Convention refugee definition endorsed by the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; 20 Imm. L.R. (2d) 85 (at 751 of S.C.R) In *Ward*, the Supreme Court went on to say, at 754, that a valid claim against one country of nationality will not fail if the claimant is denied protection (e.g. by being denied admittance) by another country of which he or she is a national.

4 *Dawlatly, George Elias George v. M.C.I.* (F.C.T.D., no. IMM-3607-97), Tremblay-Lamer, June 16, 1998.

5 *Harris, Dorca v. M.C.I.* (F.C.T.D., no. IMM-1652-97), Teitelbaum, October 31, 1997.

6 *Hanukashvili, supra*, footnote 1.

7 *Tit, Victor v. M.E.I.* (F.C.T.D., no. 93-A-17), Noël, June 3, 1993; *Bouianova, Tatiana v. M.E.I.* (F.C.T.D., no. 92-T-1437), Rothstein, June 11, 1993; *Schekotikhin, Valeri v. M.E.I.* (F.C.T.D., no. A-1178-92), McGillis, November 8, 1993; *Kochergo, Sergio Calcines v. M.E.I.* (F.C.T.D., no. IMM-2475-93, Noël, March 18, 1994;*Chavarria, Eduardo Hernandez v. M.C.I.* (F.C.T.D., no. IMM-2192-94), Teitelbaum, January 3, 1995.

of a national passport[8] as well as birth in a country[9] can create a rebuttable presumption that the claimant is a national of that country. However, the claimant can adduce evidence that the passport is one of convenience[10] or that he or she is not otherwise entitled to that country's nationality.[11] Recourse to paragraph 89 of the UNHCR *Handbook*[12] is necessary only when a person's nationality cannot be clearly established.[13]

2.1.3. Right to Citizenship

In the case of *Bouianova,* in the context of the break-up of the former Soviet Union, Mr. Justice Rothstein of the Trial Division stated:

> In my view, the decision in *Akl,*[14] is wide enough to encompass the situation of [a claimant] who, by reason of her place of birth, is entitled to be a citizen of a particular country, upon compliance with requirements that are mere formalities.
>
> In my view the status of statelessness is not one that is optional for [a claimant]. The condition of not having a country of nationality must be one

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[8] *Aguero, Mirtha Marina Galdo v. M.C.I.* (F.C.T.D., no. IMM-4216-93), Richard, October 28, 1994. In *Adar, Mohamoud Omar v. M.C.I.* (F.C.T.D., no. IMM-3623-96), Cullen, May 26, 1997, the Court held that, unless its validity is contested, a passport is evidence of citizenship. Thus the onus shifts to the claimant to prove that he or she is of a different citizenship than that indicated in the passport.

It appears that, even if a passport may have been obtained irregularly, effective nationality can be established provided that the country in question confers on the holder national status and all its attendant rights. See *Zheng, Yan-Ying v. M.C.I.* (F.C.T.D., no. IMM-332-96), Gibson, October 17, 1996. However, that case was distinguished in *Hassan, Ali Abdi v. M.C.I.* (F.C.T.D., no. IMM-5440-98), Evans, September 7, 1999, where the Court noted that the Kenyan Immigration Department only stated that, on the basis of the official's perusal of the file, the claimant appeared to be a citizen; accordingly, if the Kenyan authorities subsequently determine the claimant had not been entitled to a Kenyan passport because he was not a national (as he alleged), he could be deported from that country.

[9] *Sviridov, Timur v. M.C.I.* (F.C.T.D., no. IMM-2414-94), Dubé, January 11, 1995. In *Chouljenko, Vladimir v. M.C.I.* (F.C.T.D., no. IMM-3879-98), Denault, August 9, 1999, the Court found that the CRDD did not have reasonable grounds, in light of the claimant's and his mother's unequivocal testimony, to require that he make "every possible effort" to obtain documents proving his Armenian citizenship (the claimant was advancing a claim against Armenia).

[10] *Radic, Marija v. M.C.I.* (F.C.T.D., no. IMM-6805-93), McKeown, September 20, 1994; *Zidarevic, Branko v. M.C.I.* (F.C.T.D., no. IMM-1572-94), Dubé, January 16, 1995. Reported: *Zidarevic v. Canada (Minister of Citizenship and Immigration)* (1995), 27 Imm. L.R. (2d) 190 (F.C.T.D.).

[11] *Schekotikhin, supra,* footnote 7. See also *Hassan, supra,* footnote 8.

[12] Paragraph 89 of the *Handbook* states in part:

> There may, however, be uncertainty as to whether a person has a nationality. ... Where his nationality cannot be clearly established, his refugee status should be determined in a similar manner to that of a stateless person, i.e. instead of the country of his nationality, the country of his former habitual residence will have to be taken into account.

[13] *Kochergo, supra,* footnote 7.

[14] *M.E.I. v. Akl, Adnan Omar* (F.C.A., no. A-527-89), Urie, Mahoney, Desjardins, March 6, 1990.

> that is beyond the power of the [claimant] to control. Otherwise, a person could claim statelessness merely by renouncing his or her former citizenship.

In a series of decisions, the Trial Division has held that a claimant may be considered to be a national of a successor state[15] (to the country of his former nationality), even if he or she does not reside in that successor state, where the evidence establishes that application for citizenship is a mere formality and the authorities of the successor state do not have any discretion to refuse the application.[16]

The Trial Division has also held, in non-successor state contexts, that a legal entitlement to citizenship by birth in a place (*jus soli*),[17] through one's parents or by descent (*jus sanguinis*),[18]

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[15] The dissolution of the U.S.S.R. resulted in the emergence of 15 new states. The Russian Soviet Federative Socialist Republic (R.S.F.S.R.) is the "continuing state", having continued to respect all international treaties of the former state (U.S.S.R.), and the remaining states are "successor states". For the purpose of this paper, both the continuing state and the successor states will be referred to as "successor states".

[16] *Tit, supra,* footnote 7 (re Ukraine); *Bouianova, supra,* footnote 7 (re Russia); *Zdanov, Igor v. M.E.I.* (F.C.T.D., no. IMM-643-93), Rouleau, July 18, 1994 (re Russia, regardless of the fact that the claimant had not applied for Russian citizenship and had no desire to do so); *Igumnov, Sergei v. M.C.I.* (F.C.T.D., no. IMM-6993-93), Rouleau, December 16, 1994 (re Russia); *Chipounov, Mikhail v. M.C.I.* (F.C.T.D., no. IMM-1704-94), Simpson, June 16, 1995 (re Russia); *Avakova, Fatjama (Tatiana) v. M.C.I.* (F.C.T.D., no. A-30-93), Reed, November 9, 1995 (re Russia). Some CRDD decisions have been set aside on judicial review because the evidence did not support the conclusion that citizenship would be granted automatically or as of right, e.g. *Schekotikhin, supra,* footnote 7 (re Israel and Ukraine); *Casetellanos v. Canada (Solicitor General)*, [1995] 2 F.C. 190 (T.D.) (re Ukraine); *Solodjankin, Alexander v. M.C.I.* (F.C.T.D., no. IMM-523-94), McGillis, January 12, 1995 (re Russia).

The definition of "stateless person" found in the 1954 United Nations *Convention Relating to the Status of Stateless Persons,* in Article 1, stipulates:

> For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its laws.

To be considered as a national by operation of law means that, under the terms outlined in the state's enacted legal instruments pertaining to nationality, the individual concerned is *ex lege,* or automatically, considered a national. Those who are granted citizenship automatically by the operation of these legal provisions are definitively nationals of that state. Those who have to apply for citizenship and those the law outlines as being eligible to apply, but whose application could be rejected, are not citizens of that state by operation of that state's law. Wherever an administrative procedure allows for discretionary granting of citizenship, such applicants cannot be considered citizens until the application has been approved and completed and the citizenship of that State bestowed in accordance with the law.

[17] *Kochergo, supra,* footnote 7; *Freij, Samir Hanna v. M.E.I.* (F.C.T.D., no. A-1690-92), Jerome, November 3, 1994; *De Rojas, Teresa Rodriguez v. M.C.I.* (F.C.T.D., no. IMM-1460-96), Gibson, January 31, 1997. In *Chavarria, supra,* footnote 7, the Court found this to be so notwithstanding the requirement to become domiciled in Honduras (the country of the claimant's birth), state his intention to recover his Honduran nationality, and renounce his Salvadoran citizenship. In *Sahal, Shukri Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2722-98), Evans, April 21, 1999, the Court held that while the claimant did not have documents proving her place of birth in Ethiopia and might face some difficulty in satisfying the authorities of her citizenship, she had the obligation to make efforts to obtain documentation to assert her Ethiopian citizenship.

[18] *Desai, Abdul Samad v. M.C.I.* (F.C.T.D., no. IMM-5020-93), Muldoon, December 13, 1994 (in *obiter*); *Martinez, Oscar v. M.C.I.* (F.C.T.D., no. IMM-462-96), Gibson, June 6, 1996; *Canales, Katia Guillen v. M.C.I.* (F.C.T.D., no. IMM-1520-98), Cullen, June 11, 1999 (over the claimant's objections that she had no connection or physical link to Honduras, the country of her mother's birth, which she had never visited). In *Canales,* the

through marriage,[19] or even through ancestry[20] may also confer effective nationality. One cannot "choose" to be stateless in these circumstances.

In *Grygorian*,[21] the Trial Division found reasonable the CRDD decision which held that Israel's Law of Return conferred a right to citizenship on a Russian-born claimant of Jewish origin who had never expressed an intention to immigrate to Israel and who had never resided there. The Court viewed this as an application of the principle in *Bouianova*.

The *Grygorian* decision was found not to be a binding precedent and was not followed in *Katkova*,[22] where the Court considered Israel's Law of Return in the context of a Jewish citizen of Ukraine who did not wish to go to Israel. This factor was considered to be crucial given that the Law of Return stated that the desire to settle in Israel was a prerequisite to immigration. The Court also drew a distinction between potential rights and pre-existing status, as a national of a particular country—that is, between potential as opposed to actual nationality, and stated that *Ward* (SCC) did not deal with potential nationality. Moreover, the Court was of the view that there had to be a genuine connection or link with the home state.[23] Finally, the Court held that

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Court overturned the CRDD decision because the CRDD failed to consider whether the claimant had a well-founded fear of persecution with reference to Honduras.

[19] *Chavarria, supra*, footnote 7, where the wife's entitlement to Honduran citizenship, though dependent on her husband's application for same, only required a *pro forma* application like his. This is contrasted with *Beliakov, Alexandr v. M.C.I.* (F.C.T.D., no. IMM-2191-94), MacKay, February 8, 1996, where the wife had to do more than simply apply for Russian citizenship, a precondition was that her husband apply for and be granted citizenship which, *semble*, was not automatic in his case. In *Zayatte, Genet Yousef v. M.C.I.* (F.C.T.D., no. IMM-2769-97), McGillis, May 14, 1998. Reported: *Zayatte v. Canada (Minister of Citizenship and Immigration)* (1998), 47 Imm. L.R. (2d) 152 (F.C.T.D.), an Ethiopian citizen had married a diplomat from Guinea and thus acquired a diplomatic passport from that country. By the time she made her refugee claim in Canada, she was divorced. Letters from the Guinean embassy indicated that she had lost her diplomatic passport but could retain Guinean nationality if she so wished. However, the embassy had failed to consider that under Guinean law, there was a two-year residency requirement in order to become a naturalized national, and the claimant had never resided in Guinea. The CRDD decision finding her to be a Guinean citizen was therefore overturned.

[20] *Grygorian, Antonina v. M.C.I.* (F.C.T.D., no. IMM-5158-94), Joyal, November 23, 1995. Reported: *Grygorian v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 52 (F.C.T.D.).

[21] *Grygorian, ibid.*, at 55.

[22] *Katkova, Lioudmila v. M.C.I.* (F.C.T.D., no. IMM-3886-96), McKeown, May 2, 1997. Reported: *Katkova v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm. L.R. (2d) 216 (F.C.T.D.). The Court certified a question regarding the Law of Return. See also CRDD T94-07106, Zimmer, Hope, November 13, 1996, where the claimant was found to express a desire to settle in Israel because she had applied to immigrate there before coming to Canada.

[23] The term "genuine and effective link" was first enunciated in the *Nottebohm* case (International Court of Justice Reports, 1955, at 23), in the context of opposability between states, as a means of characterizing citizenship attribution which should be recognized at the international level. The concept, as extrapolated from that case and the nationality practice of states in general, has since been molded and shaped into a broader principle in international law. The concept of an ascertainable tie between the individual and a state is an important doctrine in the area of nationality law. This doctrine is based upon principles embodied in state practice, treaties, case law and general principles of law. The genuine and effective link between an individual and a state manifested by factors such as birth and/or descent, and often including habitual residence, is reflected to some degree in a majority of domestic nationality legislation.

the Law of Return conferred a discretionary power on the Israeli Minister of the Interior to deny citizenship.

In *Moudrak*,[24] the Trial Division held that the CRDD did not err in placing considerable weight, in assessing the well-foundedness of the alleged fear of persecution in Ukraine, on the fact that the claimant, a citizen of Ukraine of Polish descent, made no effort to investigate acquiring Polish citizenship (which was not guaranteed) when she travelled to Poland.

2.1.4. Effectiveness of Nationality

In *Martinez*,[25] the Trial Division, after citing *Ward*[26] and James C. Hathaway's *The Law of Refugee Status*,[27] appeared to accept that there is a need to ensure that a state of citizenship accords effective, rather than merely formal nationality, as well as to assess any evidence impeaching that state's protection against return to the country of persecution.

2.2. FORMER HABITUAL RESIDENCE

Former habitual residence is only relevant where the claimant is stateless, i.e. he does not have a country of nationality.[28]

2.2.1. Principles and Criteria for Establishing Country of Former Habitual Residence

In the *Maarouf*[29] decision, Mr. Justice Cullen of the Trial Division, after an extensive review of the legal principles and authorities, endorsed the following propositions:

> In my view, the concept of "former habitual residence" seeks to establish a relationship to a state which is broadly comparable to that between a citizen and his or her country of nationality. Thus the term implies a situation where a stateless person was admitted to a given country with a view to continuing residence of some duration, without necessitating a minimum period of residence.
>
> ... a "country of former habitual residence" should not be limited to a country where the claimant initially feared persecution. Finally, the claimant does not have to be legally able to return to a country of former habitual residence as a denial of a right of return may in itself constitute an act of persecution

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[24] *Moudrak, Vanda v. M.C.I.* (F.C.T.D., no. IMM-1480-97), Teitelbaum, April 1, 1998.

[25] *Martinez, supra,* footnote 18, at 5-6.

[26] *Ward, supra,* footnote 3, at 754.

[27] (Toronto: Butterworths, 1991), at page 59.

[28] *Lin, Yu Hong v. M.C.I.* (F.C.T.D., no. IMM-1855-94), Reed, December 12, 1994. Note that residency may also be a relevant factor when considering exclusion under Article 1E of the Convention (see Chapter 10, section 10.1.).

[29] *Maarouf v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 723 (T.D.); (1993), 23 Imm. L.R. (2d) 163 (F.C.T.D)

> by the state. The claimant must, however, have established a significant period of *de facto* residence in the country in question.[30]

The Trial Division has held, in a number of decisions, that a country may be a country of former habitual residence even if the claimant is not legally able to return to that country.[31]

A country can be a country of former habitual residence even though it is a successor state to a larger country which the claimant left.[32]

2.2.2. Multiple Countries of Former Habitual Residence

The Federal Court of Appeal in *Thabet*[33] clarified the conflicting case law emanating from the Trial Division[34] regarding the country of reference in claims made by stateless persons who have habitually resided in more than one country. The Court of Appeal answered the certified question put to it as follows:

> In order to be found to be a Convention refugee, a stateless person must show that, on a balance of probabilities he or she would suffer persecution in any country of former habitual residence, and that he or she cannot return to any of his or her other countries of former habitual residence. (At 40.)

The Court of Appeal considered four options—the first country, the last one, all the countries, or any of the countries—but rejected all of them. Instead it adopted as a test what it termed "any country plus the *Ward* factor" as being consistent with the language of the Convention refugee definition and the teachings of the Supreme Court of Canada in *Ward*. Mr. Justice Linden expressed the Court's ruling in another way in the reasons for judgment:

> If it is likely that a person would be able to return to a country of former habitual residence where he or she would be safe from persecution, that person is not a refugee. This means that the claimant would bear the burden

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[30] *Maarouf, ibid.*, at 739-740.

[31] *Maarouf, supra,* footnote 29; *Bohaisy, Ahmad v. M.E.I.* (F.C.T.D., no. IMM-3397-93), McKeown, June 9, 1994; *Ibrahim, Ali Ibrahim Khalil v. S.S.C.* (F.C.T.D., no. IMM-4190-93), Pinard, July 8, 1994. Reported: *Ibrahim v. Canada (Secretary of State)* (1994), 26 Imm. L.R. (2d) 157 (F.C.T.D); *Zdanov, supra,* footnote 16; *Shaat, Rana v. M.E.I.* (F.C.T.D., no. A-539-92), McGillis, August 4, 1994. Reported: *Shaat v. Canada (Minister of Employment and Immigration)* (1994), 28 Imm. L.R. (2d) 41 (F.C.T.D.); *El Khatib, Naif v. M.C.I.* (F.C.T.D., no. IMM-5182-93), McKeown, September 27, 1994; *Desai, supra,* footnote 18.

[32] *Lenyk, Ostap v. M.C.I.* (F.C.T.D., no. IMM-7098-93), Tremblay-Lamer, October 14, 1994. Reported: *Lenyk v. Canada (Minister of Citizenship and Immigration)* (1994), 30 Imm. L.R. (2d) 151 (F.C.T.D.), where the claimants had left Ukraine when it was part of the U.S.S.R. Madame Justice Tremblay-Lamer stated at 152: "The change of name of the country does not change the fact that it was the place where the [claimants] always resided prior to coming to Canada, and therefore it is their country of former habitual residence."

[33] *Thabet v. Canada (Minister of Employment and Immigration),* [1998] 4 F.C. 21 (C.A); 48 Imm. L.R. (2d) 195 (F.C.A.).

[34] *Maarouf, supra,* footnote 29; *Martchenko, Tatiana v. M.C.I.* (F.C.T.D., no. IMM-3454-94), Jerome, November 27, 1995 (any country); *Thabet v. Canada (Minister of Citizenship and Immigration),* [1996] 1 F.C. 685 (T.D.) (the last country).

> ... of showing on a balance of probabilities that he or she is unable or unwilling to return to any country of former habitual residence. (At 39.)

In effect, this means that if a stateless person has multiple countries of former habitual, the claim may be established by reference to any such country. However, if the claimant is able to return to any other country of former habitual residence, the claimant must, in order to establish the claim, also demonstrate that he or she faces persecution there.

The Trial Division applied the principles of the *Thabet* decision in *Elbarbari.*[35] Since the claimant could not return to any of the three countries in which he had formerly resided, the CRDD erred by not considering his fear of persecution in Iraq, after finding that the claimant did not have a well-founded fear of persecution in Egypt and the United States.

2.2.3. Nature of Ties to Country

The Federal Court has not yet treated in any depth the nature of the ties required for a country to constitute a country of former habitual residence in cases where there are two or more countries in which the claimant has resided. However, it is suggested that, at a minimum, the assessment include the factors mentioned in *Maarouf*, namely, whether the person was admitted into the country for the purpose of continuing residence of some duration (without necessitating a minimum period of residence), and whether there was a significant period of *de facto* residence. On the other hand, there is no requirement that the claimant be legally able to return.

In *Kruchkov*,[36] the Trial Division held that the determination of one's country of former habitual residence is a question of fact, not of law.

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[35] *Elbarbari, Sohayl Farouk S. v. M.C.I.* (F.C.T.D., no. IMM-4444-97), Rothstein, September 9, 1998.

[36] *Kruchkov, Valeri v. S.G.C.* (F.C.T.D., no. IMM-5490-93), Tremblay-Lamer, August 29, 1994, at 2. This decision was followed in *Tarakhan, Ali v. M.C.I.* (F.C.T.D., no. IMM-1506-95), Denault, November 10, 1995. Reported: *Tarakhan v. Canada (Minister of Citizenship and Immigration)* (1995), 32 Imm. L.R. (2d) 83 (F.C.T.D), at 86. In that case, the Court upheld the CRDD's decision that the only relevant country was Jordan, where the claimant, a stateless Palestinian, was born and resided until age 23; he then moved to different posts as directed by his employer, the PLO (1 year in Lebanon; 2 years in Yemen; and 5 years in Cyprus), before leaving for Holland where he made an unsuccessful refugee claim. In *Thabet, supra,* footnote 34, the Trial Division held that the claimant was a former habitual resident of the United States, since he had resided there for 11 years, first as a student, and then as a visitor and refugee claimant; while there, he married twice, held a social security card, and filed income tax returns. (The Court of Appeal overturned this decision on other grounds.) In *Absee, Mrwan Mohamed v. M.E.I.* (F.C.T.D., no. A-1423-92), Rouleau, March 17, 1994, the claimant, a stateless Palestinian, was born in the Occupied Territories, moved to Jordan at age 6, and resided for short periods in Kuwait (on a temporary basis) and in the United States (illegally); the claim was assessed only against Jordan. In *Alusta,Khahil v. M.E.I.* (F.C.T.D., no. A-779-92), Denault, May 16, 1995, the stateless Palestinian-born claimant lived in Germany for 20 years, and then in Morocco for 14 years, with his Moroccan wife and 4 children, on the basis of a residence permit renewable annually on proof of employment; the Court held that the CRDD was correct to base its determination on his habitual residence in Morocco.

2.2.4. Subsisting Well-Founded Fear of Persecution

Statelessness *per se* does not give rise to a claim to refugee status: the claimant must demonstrate a well-founded fear of persecution based on a Convention ground.[37] Alternatively, the claimant must be outside his or her country of former habitual residence for a Convention reason.[38]

The requirement of having to demonstrate a subsisting well-founded fear of persecution, where the stateless claimant is unable to return to his or her country of former habitual residence, was not resolved by the Federal Court of Appeal. In *Shahin*,[39] Mr. Justice Linden stated:

> As for the legal issue of whether a stateless person needs to prove only an inability to return home, or whether a showing of a reasonable fear of persecution is also required, we do not feel we should try to resolve that matter at this stage of the proceeding, preferring instead to leave that matter to be dealt with by the new panel.

2.2.5. Evidence of Persecution for a Convention Reason

A denial of a right to return may, in appropriate circumstances, in itself constitute an act of persecution by the state.[40] However, for it to be the basis of a claim, the refusal must be based on a Convention ground, and not be related simply to immigration laws of general application.[41]

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[37] *Arafa, Mohammed v. M.E.I.* (F.C.T.D., no. A-663-92), Gibson, November 3, 1993, at 4; *Lenyk, supra,* footnote 32, at 152. See also UNHCR *Handbook,* paragraph 102.

[38] *Maarouf, supra,* footnote 29, at 737.

[39] *Shahin, Jamil Mohammad v. S.S.C.* (F.C.A., no. A-263-92), Stone, Linden, Robertson, February 7, 1994, at 2.

[40] *Maarouf, supra,* footnote 29, at 739-740; *Abdel-Khalik, Fadya Mahmoud v. M.E.I.* (F.C.T.D., no. IMM-883-93), Reed, January 31, 1994. Reported: *Abdel-Khalik v. Canada (Minister of Employment and Immigration)* (1994), 23 Imm. L.R. (2d) 262 (F.C.T.D.), at 263-264; *Thabet* (T.D.), *supra,* footnote 34 at 693; *Thabet* (C.A.), *supra,* footnote 29 at 41.

[41] In *Arafa, supra,* footnote 37, the claimant's continued permission to remain in the United Arab Emirates, once he turned 18, was dependent upon the continuation of his education or obtaining a work permit and employment there; his last one-year authorization became invalidated when he resided outside the U.A.E. for more than 6 months. In *Alusta, supra,* footnote 36, the condition for obtaining a Moroccan residence permit, namely proof of employment, was found to be unrelated to a Convention ground. In *Altawil, Anwar Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2365-95), Simpson, July 25, 1996, the claimant lost his residence status in Qatar, which was renewable every 6 months, because he failed to return in 1986 because of the war in Afghanistan where he was a student; the Court upheld the CRDD determination that he was not outside the country, nor had Qatar denied him reentry, because of a Convention reason. Simpson J. stated at 5-6: "... it seems to me that there must be something in the real circumstances which suggests persecutorial intent or conduct. Absent such evidence, I am not prepared to conclude that the Law, which is one of general application, is persecutorial in effect ..." In *Daghmash, Mohamed Hussein Moustapha v. M.C.I.* (F.C.T.D., no. IMM-4302-97), Lutfy, June 19, 1998, the Court upheld the CRDD's conclusion that the claimant's inability to return to Saudi Arabia was due to his not being able to obtain an employment sponsor, and not to his Palestinian background; the requirement of an employment contract to maintain one's residency status is unrelated to the grounds in the definition of a Convention refugee. In *Elastal, Mousa Hamed v. M.C.I.* (F.C.T.D., no. IMM-3425-97), Muldoon, March 10, 1999, the Court cited with approval the CRDD's finding that the claimant's lack of a right to return to the United States was not persecutory because, as an illegal resident, he never had the right to return there.

In *Thabet,*[42] the Court of Appeal held that the CRDD had addressed that question adequately when it found that the claimant could not return to Kuwait because he lacked a valid residency permit.

A recent application to return to one's country of former habitual residence is not a requirement: a claimant can rely on earlier unsuccessful attempts by family members as well as on documentary evidence.[43]

Having regard to paragraph 143 of the UNHCR *Handbook*, an UNWRA document issued to a Palestinian refugee was found to be cogent, though not determinative evidence of refugeehood.[44]

2.2.6. State Protection

As to whether or not stateless claimants need to avail themselves of state protection, the decisions of the Trial Division are not consistent. The UNHCR *Handbook*, in paragraph 101, states that "... [i]n the case of a stateless refugee, the question of 'availment of protection' of the country of his former habitual residence does not, of course, arise."

In *El Khatib,* [45] Mr. Justice McKeown agreed with this approach and stated:

> ... the discussion and conclusions reached in *Ward*[46] apply only to a citizen of a state, and not to stateless people. In my view the distinction between

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[42] *Thabet, supra,* footnote, 33, at 41.

[43] *Shahin, supra,* footnote 39, at 2.

[44] *El-Bahisi, Abdelhady v. M.E.I.* (F.C.T.D., no. A-1209-92), Denault, January 4, 1994, at 2-3.

[45] *El Khatib, supra,* footnote 31, at 2. The Court agreed to certify the following question:

> On a claim to Convention refugee status by a stateless person, is the "well-foundedness" analyis set out by the Supreme Court of Canada in [*Ward*] applicable, based as it is on the availability of state protection, or is it only applicable if the claimant is a citizen of the country in which he or she fears persecution?

The Court of Appeal, in dismissing the appeal in *El Khatib,* declined to deal with the certified question because it was not determinative of the appeal. See *M.C.I. v. El Khatib, Naif-El* (F.C.A., no. A-592-94), Strayer, Robertson, McDonald, June 20, 1996.

In *Tarakhan, supra,* footnote 36, at 89, the Trial Division also held that where the claim is that of a stateless person, the claimant need only show that he or she is unable, or by reason of a well-founded fear of persecution, is unwilling to return to the country of former habitual residence. The claimant does not have to prove that the authorities of that country are unable or unwilling to protect him or her. One aspect the Court did not address is the requirement in *Ward, supra,* footnote 3, at 712, that the analysis of whether a well-founded fear of persecution exists include a consideration of the state's inability to protect. In *Pachkov, Stanislav v. M.C.I.* (F.C.T.D., no. IMM-2340-98), Teitelbaum, January 8, 1999. Reported: *Pachkov v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm. L.R. (2d) 55 (F.C.T.D.), the Court held that the CRDD erred in imposing on the claimant, who was a stateless person, a duty to refute the presumption of state protection. See also *Elastal, supra,* footnote 41, to the same effect, which cited the Court of Appeal decision in *Thabet, supra,* footnote 33, though that decision did not specifically rule on the issue.

[46] *Ward, supra,* footnote 3, at 751.

> paragraphs 2(1)(a)(i) and 2(1)(a)(ii) of the *Act* is that the stateless person is not expected to avail himself of state protection when there is no duty on the state to provide such protection.

However, other Trial Division decisions have taken into account state protection that might be available to the claimant in his or her country of former habitual residence.[47] For example, in *Nizar*[48] the Court was of the view that, even though states owe no duty of protection to non-nationals, "it is relevant for a stateless person, who has a country of former habitual residence, to demonstrate that *defacto* (sic) protection within that state, as a result of being resident there, is not likely to exist." The Court reasoned that this was relevant to the well-foundedness of the claimant's fear.

This issue was further confused by the decision in *Vickneswaramoorthy,*[49] where the Court suggested that the same standard of proof to demonstrate the state's inability to protect persecuted individuals applies to stateless persons as to those with a country of nationality.

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[47] *Giatch, Stanislav v. M.E.I.* (F.C.T.D., no. IMM-3438-93), Gibson, March 22, 1994; *Zaidan, Bilal v. S.S.C.* (F.C.T.D., no. A-1147-92), Noël, June 16, 1994; *Zvonov, Sergei v. M.E.I.* (F.C.T.D., no. IMM-3030-93), Rouleau, July 18, 1994. Reported: *Zvonov v. Canada (Minister of Employment and Immigration)* (1994), 28 Imm. L.R. (2d) 23 (F.C.T.D.); *Falberg, Victor v. M.C.I.* (F.C.T.D., no. IMM-328-94), Richard, April 19, 1995.

[48] *Nizar v. M.C.I.* (F.C.T.D., no. A-1-92), Reed, January 10, 1996, at 5.

[49] *M.C.I. v. Vickneswaramoorthy, Poologam* (F.C.T.D., no. IMM-2634-96), Jerome, October 2, 1997.

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CHAPTER 3

3. PERSECUTION

3.1. GENERALLY

3.1.1. Definition

Like other terms in the Convention refugee definition, "persecution" is a word whose meaning is neither self-evident nor defined in the *Immigration Act*. Therefore, it has fallen to the courts to identify the boundaries of the word. Case-law has not only labelled specific behaviours as instances of persecution, but also has gone some distance toward identifying general hallmarks that must be present, or criteria that must be met, in order for actions or omissions to constitute persecution.

3.1.1.1. Serious Harm

First, to be considered persecution, the mistreatment suffered or anticipated must be serious.[1] And in order to determine whether particular mistreatment would qualify as "serious", one must examine:

1. what interest of the claimant might be harmed; and

2. to what extent the subsistence, enjoyment, expression or exercise of that interest might be compromised.

This approach has been approved by the courts, which have equated the notion of a serious compromising of interest with a key denial of a core human right. Thus, in *Ward*,[2] the Supreme Court said as follows:

> Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination. This is indicated in the preamble to the treaty as follows:
>
> > CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights ... have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

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1 *Sagharichi, Mojgan v. M.E.I.* (F.C.A., no. A-169-91), Isaac, Marceau, MacDonald, August 5, 1993, at 2. Reported: *Sagharichi v. Canada (Minister of Employment and Immigration)* (1993), 182 N.R. 398 (F.C.A.); *Saddouh (Kaddouh), Sabah v. M.E.I.* (F.C.T.D., no. IMM-2200-93), Denault, February 2, 1994. Leave to appeal to the Supreme Court of Canada was denied without reasons on February 17, 1998 (S.C.C. File no. 23826).

2 *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 20 Imm. L.R. (2d) 85.

> This theme ... provides an inherent limit to the cases embraced by the Convention. Hathaway, ... at p. 108, thus explains the impact of this general tone on the treaty on refugee law:
>
> > The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard.
>
> This theme sets the boundaries for many of the elements of the definition of Convention "refugee". "Persecution", for example, undefined in the Convention, has been ascribed the meaning of "sustained or systemic violation of basic human rights demonstrative of a failure of state protection"; see Hathaway, ... at pp. 104-105. So too Goodwin-Gill, ... at p.38 observes that "comprehensive analysis requires the general notion [of persecution] to be related to developments within the broad field of human rights". This has recently been recognized by the Federal Court of Appeal in the *Cheung* case.[3]

In *Chan*,[4] La Forest J. (in dissent) reiterated that "[t]he essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way." Mr. Justice La Forest also said:

> These basic human rights are not to be considered from the subjective perspective of one country ... By very definition, such rights transcend subjective and parochial perspectives and extend beyond national boundaries. This does not mean, however, that recourse to the municipal law [i.e. domestic or internal law] of the admitting nation may not be made. For such municipal law may well animate a consideration of whether the alleged feared conduct fundamentally violates basic human rights.[5]

If the conduct does amount to persecution, there is no further requirement that the persecution be dramatic or appalling or horrendous,[6] unless the issue in the case involves the application of section 2(3) of the *Immigration Act* (see Chapter 7, section 7.2).

The requirement that the harm be serious has led to a distinction between persecution on the one hand, and discrimination or harassment on the other, with persecution being characterized

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[3] *Ward, ibid.*, at 733-734. See also *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.), at 324-5.

[4] *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, at 635.

[5] *Chan, ibid.*, at 635. The majority of the Court decided the case on other grounds and did not rule explicitly on this issue. For a more detailed discussion of the *Chan* judgment, see Chapter 9, section 9.3.7. With respect to considering Canadian standards or laws see *Antonio, Pacato Joao v. M.E.I.* (F.C.T.D., no. IMM-1072-93), Nadon, September 27, 1994, at 11-12. See also the UNHCR *Handbook*, paragraph 60.

[6] *El Khatib, Naif v. M.C.I.* (F.C.T.D., no. IMM-5182-93), McKeown, September 27, 1994, at 4. The appeal was dismissed by the Federal Court of Appeal: *M.C.I. v. El Khatib, Naif* (F.C.A., no. A-592-94), Strayer, Robertson, McDonald, June 20, 1996.

by the greater seriousness of the mistreatment which it involves.[7] Discrimination and harassment are sometimes conceived of as being distinct from persecution; alternatively, some references to persecution and discrimination imply that persecution is a subset of discrimination; but in either case, what distinguishes persecution - whether from discrimination or non-persecutory discrimination - is the degree of seriousness of the harm. The Court of Appeal has observed that "the dividing line between persecution and discrimination or harassment is difficult to establish."[8] As to the particular susceptibilities of a given claimant, the Court in *Nejad*[9] said the following:

> The CRDD did recognize and the Court agrees that there may be certain circumstances in which the particular characteristics or circumstances of a claimant ... might affect the assessment of whether certain acts or treatments are persecutory. [To] ... the extent that an agent of persecution intentionally plays upon or exploits the fact that a person suffers from a particular frailty or condition in order to cause harm, an act not normally or inherently persecutorial, may be transformed into an act of persecution.
>
> That is beautiful in theory, but who knows what is the intention of the persecutor? Who knows what is the particular knowledge of the persecutor? One must look at the act and the effect.[10] And in this case, in particular, because of the old age of the applicants, it should have been more obvious to the CRDD panel that the effect upon them was that of persecution.

For additional material on the distinction between persecution and discrimination, see paragraph 54 of the UNHCR *Handbook*; and the IRB Preferred Position Paper, *Discrimination as a Basis For a Well-Founded Fear of Persecution*, March 1992. [Note: the preferred position paper has not been updated since March 1992].

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[7] *Naikar, Muni Umesh v. M.E.I.* (F.C.T.D., no. 93-A-120), Joyal, June 17, 1993, at 2; *Sagharichi, supra,* footnote 1, at 2 (unreported); *Saddouh, supra,* footnote 1. See also *Kwiatkowsky v. Canada (Minister of Employment and Immigration)*, [1982] 2 S.C.R. 856, at 862 and 863. The Trial Division has also distinguished between persecution and mere unfairness: *Chen, Yo Long v. M.C.I.* (F.C.T.D., no. IMM-487-94), Richard, January 30, 1995, at 4.

[8] *Sagharichi, supra,* footnote 1, at 2, per Marceau J.A. Even though the claimant may not be able to point to an individual episode of mistreatment which could be characterized as persecution, the claimant may still have experienced persecution or have good grounds for fearing persecution: see the discussion of cumulative acts in section 3.1.2. of this chapter, and the discussion of well-founded fear in Chapter 5.

[9] *Nejad, Hossein Hamedi v. M.C.I.* (F.C.T.D., no. IMM-2687-96), Muldoon, July 29, 1997, at 2. In the typescript of the Court's reasons, the first portion of this passage is presented as though it were part of a quotation from *Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629 (C.A.); however, the statements in question do not actually appear in that case, and seem instead to have been the words of Muldoon J. himself. On this same theme, see paragraphs 40 and 52 of the UNHCR *Handbook*.

[10] Compare these lines with the affirmation in *Ward*, at 747, that "[t]he examination of the circumstances should be approached from the perspective of the persecutor ...", and with the emphasis placed upon the intent of a law (which may be equated with the intent of the agent of persecution) by *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 (C.A.), at 552, quoted in Chapter 9, section 9.3.2. (proposition 1). Compare also *Zolfagharkhani*'s assertion, at 552, that the neutrality of a law is to be judged objectively: see Chapter 9, section 9.3.2. (proposition 2).

3.1.1.2. Repetition and Persistence

A second criterion of persecution is that the inflicting of harm occurs with repetition or persistence, or in a systematic way. This requirement has been approved in *Ward* (quoting Hathaway).[11] It also derives from the Court of Appeal decision in *Rajudeen*,[12] which is much-cited on this point:

> The definition of Convention refugee in the *Immigration Act* does not include a definition of "persecution". Accordingly, ordinary dictionary definitions may be considered. *The Living Webster Encyclopedic Dictionary* defines "persecute" as:
>
> > "To harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently, to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship."
>
> The *Shorter Oxford English Dictionary* contains, *inter alia*, the following definitions of "persecution":
>
> > "A particular course or period of systematic infliction of punishment directed against those holding a particular (religious belief); persistent injury or annoyance from any source."
>
> ...[the evidence] establishes beyond doubt a lengthy period of systematic infliction of threats and of personal injury. The applicant was not mistreated because of civil unrest in Sri Lanka but because he was a Tamil and a Muslim.[13]

The Court of Appeal later provided something of an elaboration in *Valentin*[14]:

> ...it seems to me ... that an isolated sentence can only in very exceptional cases satisfy the element of repetition and relentlessness found at the heart of persecution (cf. *Rajudeen*...) ...[15]

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[11] *Ward, supra*, footnote 2, at 733-734. See excerpt reproduced at pages 1-2 of this Chapter.

[12] *Rajudeen, Zahirdeen v. M.E.I.* (F.C.A., no. A-1779-83), Heald, Hugessen, Stone (concurring), July 4, 1984. Reported: *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129 (F.C.A.).

[13] *Rajudeen, ibid.*, at 133-134, per Heald J.A.

[14] *Valentin v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 390 (C.A.), at 396, per Marceau J.A.

[15] See also *Kadenko, Ninal v. S.G.C.* (F.C.T.D., no. IMM-809-94), Tremblay-Lamer, June 9, 1995. Reported: *Kadenko v. Canada (Solicitor General)* (1995), 32 Imm. L.R. (2d) 275 (F.C.T.D.), rev'd *M.C.I. v. Kadenko, Ninal* (F.C.A., no. A-388-95), Décary, Hugessen, Chevalier, October 15, 1996, where the Trial Division, at 6, considered a dictionary definition of "isolated", and concluded that, where repeated incidents of harassment, together with physical attacks, had occurred over the course of a year and a half, it was unreasonable to speak of "isolated" acts. (The Court of Appeal reversed the decision on the issue of state protection and did not deal with the persecution findings. Leave to appeal to the Supreme Court of Canada was denied without reasons on May 8, 1997 (S.C.C. File no. 25689)). In *Ahmad, Rizwan v. S.G.C.* (F.C.T.D., no. IMM-7180-93), Teitelbaum, March 14, 1995, at 7 (French version), the Court distinguished between systematic events and ones that were only periodic.

Jurisprudence also recognizes that some sentences and forms of punishment of undue proportion by the state may be considered as persecution, such as in certain instances of military evaders.[16]

These authorities notwithstanding, it would seem that persistence or repetition should not be regarded as a necessary element in all cases. Some forms of harm are unlikely to be inflicted repeatedly (e.g., female genital mutilation), or are simply incapable of being repeated (e.g., the killing of the claimant's family as a form of retribution against the claimant); nevertheless, they are so severe that their characterization as persecution seems beyond dispute.[17]

3.1.1.3. Nexus

For a claim to succeed, the definition of Convention refugee requires that the persecution be linked to a Convention ground. The Supreme Court of Canada noted in *Ward* that:

> ... the international community did not intend to offer a haven for all suffering individuals. The need for "persecution" in order to warrant international protection, for example, results in the exclusion of such pleas as those of economic migrants, i.e. individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance. ...[18]

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[16] *Abramov, Andrei* v. *M.C.I.* (F.C.T.D., no. IMM-3576-97), Tremblay-Lamer, June 15, 1998.

[17] In two decisions, the Trial Division has certified questions regarding the need for persistence, the questions being almost identical in the two cases: *Murugiah, Rahjendran v. M.E.I.* (F.C.T.D., no. 92-A-6788), Noël, May 18, 1993, at 6; and *Rajah, Jeyadevan v. M.E.I.* (F.C.T.D., no. 92-A-7341), Joyal, September 27, 1993, at 5-6. In *Rajah*, the question was phrased thus: "Whether 'persecution' within the meaning of the Convention Refugee definition requires systematic and persistent acts or whether one or two violations of basic and inalienable rights such as forced labour or beatings while in police detention is enough to constitute 'persecution'."

Essentially the same question was proposed for certification in *Muthuthevar, Muthiah v. M.C.I.* (F.C.T.D., no. IMM-2095-95), Cullen, February 15, 1996. Cullen J., declining to certify, said at 5: "I think it is settled law that, in some instances, even a single transgression of the applicant's human rights would amount to persecution." See also *Gutkovski, Alexander v. S.S.C.* (F.C.T.D., no. IMM-746-94), Teitelbaum, April 6, 1995, where at page 9, the Court noted: "...the events must be sufficiently serious or systematic to amount to a reasonable fear of persecution." (emphasis in original). However, note the discussion in Chapter 9, section 9.3.3. regarding "Policing Methods, National Security and Preservation of Social Order".

[18] *Ward, supra,* footnote 2, at 732. See also the excerpt from *Rajudeen, supra,* footnote 12, reproduced in section 3.1.1.2. of this Chapter. And see *Karaseva, Tatiana v. M.C.I.* (F.C.T.D., no. IMM-4683-96), Teitelbaum, November 26, 1997, at paragraphs 10, 14-15, and 17-22. In *Molaei, Farzam v. M.C.I.* (F.C.T.D., no. IMM-1611-97), Muldoon, January 28, 1998, the Court noted that there must be a nexus between the personal situation of the claimant and the general situation of the country of nationality in which the claimant fears persecution. And in *Cetinkaya, Lukman v. M.C.I.* (F.C.T.D., no. IMM-2559-97), Muldoon, July 31, 1998, the Court noted that while certain members of the PKK in Turkey may face persecution, it is for the claimant to demonstrate that she falls within that class of individuals who face persecution, as well as to provide the nececssary link between her actions and the persecution feared. See also the recent case of *Li, Qing Bing v. M.C.I.* (F.C.T.D., no. IMM-5095-98), Reed, August 27, 1999, where the claimant stated, among other things, that the government of China does not provide basic medical services, nor does it allow him an adequate opportunity to earn a living. The Court agreed with the CRDD that there was no nexus between the claimant's hardships and a Convention ground.

Indirect persecution does not constitute persecution within the meaning of the definition of Convention refugee as there is no personal nexus between the claimant's alleged fear and a Convention ground. Accordingly, the Federal Court of Appeal in *Pour-Shariati* held, overruling *Bhatti,*[19] a case recognizing the concept of indirect persecution, that:

> We accordingly overrule Bhatti's recognition of the concept of indirect persecution as a principle of our refugee law. In the words of Nadon, J. in Casetellanos v. Canada (Solicitor General) (1994), 89 F.T.R. 1, 11, "since indirect persecution does not constitute persecution within the meaning of Convention refugee, a claim based on it should not be allowed." It seems to us that the concept of indirect persecution goes directly against the decision of this Court in Rizkallah v. Canada, A-606-90, decided 6 May 1992, [1992] F.C.J. No. 412, where it was held that there had to be a personal nexus between the claimant and the alleged persecution on one of the Convention grounds. One of these grounds is, of course, a "membership in a particular social group," a ground which allows for family concerns in on [sic] appropriate case.[20]

3.1.1.4. Common Crime or Persecution?

Persecution has been distinguished from random and arbitrary violence[21] and from suffering as a result of a criminal act or a personal vendetta.[22] In a few of the cases where the claimant has been victimized by what might be characterized as a "common" crime, there has been some discussion of whether the mistreatment in question might qualify as "persecution". The Trial Division has said that most acts of persecution can be characterized as criminal, but that in an individual case the Refugee Division may nevertheless distinguish between criminal acts and persecution.[23] In the case of *Alifanova*,[24] the Court has further commented that while most acts of persecution are criminal in nature, not all criminal acts can be considered acts of persecution. It continues to give the following example: "Extortion is a criminal act. Threats of bodily harm is a criminal act. Because these criminal acts are made by Kazakhs against Russians does not make the act one of persecution." Some of the cases in this area involve personal

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[19] *Bhatti, Naushaba v. Canada (Secretary of State)* (F.C.T.D., no. A-89-93), Jerome, September 14, 1994.

[20] *Pour-Shariati, Dolat v. Canada v. M.E.I.* (F.C.A., no. A-721-94), MacGuigan, Robertson, McDonald, June 10, 1997, at 4. Followed in *Kanagalingam, Uthayakumari v. M.C.I.* (F.C.T.D., no IMM-566-98), Blais, February 10, 1999, where the Court held that the loss of the claimant's father, brother and fiancé at the time when the IPKF governed the security situation in the north of Sri Lanka, was indirect persecution and, therefore, not persecution within the meaning of the definition.

[21] *Abrego, Apolonio Paz v. M.E.I.*(F.C.A., no. A-348-91), Hugessen, Linden, Holland, February 18, 1993.

[22] See Chapter 4, section 4.7. See also *Atwal, Mohinder Singh v. M.C.I.* (F.C.T.D., no. IMM-6769-98), Nadon, November 17, 1999, where the Court agreed with the CRDD that there was no nexus between the applicant's claim and a Convention ground as the alleged acts of persecution were the result of personal vengeance and not the result of the claimant's political opinions.

[23] *Cortez, Delmy Isabel v. S.S.C.* (F.C.T.D., no. IMM-2482-93), McKeown, December 15, 1993, at 2. See also *Pierre-Louis, Edy v. M.E.I.* (F.C.A., no. A-1264-91), Hugessen, MacGuigan, Décary, April 29, 1993, at 2 (personal vengeance); *Sirin, Hidayet v. M.C.I.* (F.C.T.D., no. IMM-5720-93), Pinard, November 28, 1994 (family vendetta); *Balendra, Cheran v. M.C.I.* (F.C.T.D., no. IMM-1653-94), Richard, January 30, 1995, at 3 (police corruption); and *Karaseva, supra*, footnote 18, at 14-15, and 17-22 (crimes allegedly with ethnic motivation).

[24] *Alifanova, Nathalia* v. *M.C.I.* (F.C.T.D., no. IMM-5501-97), Teitelbaum, December 11, 1998.

vendettas, or the misuse of official position, or the witnessing of criminal acts. Others involve domestic abuse: the Court of Appeal in *Mayers,*[25] said that the Refugee Division might find domestic violence to be persecution, but in the circumstances of the case, the Court was not required to make that finding;[26] the Trial Division, in a number of cases has regarded domestic abuse as persecution.[27] However, an assessment of whether domestic abuse is tantamount to persecution requires a careful examination of the circumstances and facts of each case. For instance, in the case of *Aros*[28], the Court upheld the CRDD finding that abused women in domestic situations were not a persecuted social group in Chile.

In assessing these sorts of claims, it is suggested that members inquire whether the harm is serious,[29] whether there is a serious possibility of the harm's occurring, whether the harm is inflicted for a Convention reason,[30] and whether state protection is available.[31] The finding of state protection must be made on the basis of the evidence before the panel rather than on mere speculation.[32] See also Chapter 4, section 4.7.

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[25] *Canada (Minister of Employment and Immigration) v. Mayers*, [1993] 1 F.C. 154 (C.A.).

[26] *Mayers, ibid.*, at 169-170, per Mahoney J.A.

[27] *Diluna, Roselene Edyr Soares v. M.E.I.* (F.C.T.D., no. IMM-3201-94), Gibson, March 14, 1995. Reported: *Diluna v. Canada (Minister of Employment and Immigration)* (1995), 29 Imm. L.R. (2d) 156 (F.C.T.D.), at 4. In an earlier decision, the Trial Division seemed inclined to the view that the abuse involved in the case did constitute persecution: *Narvaez v. Canada (Minister of Citizenship and Immigration),* [1995] 2 F.C. 55 (T.D.), at 64 and 70-1. See also *Rodionova, Svetlana v. M.E.I.* (F.C.T.D., no. 92-A-6839), Strayer, July 7, 1993; and *Jebnoun, Fadhila v. M.C.I.* (F.C.T.D., no. IMM-6261-93), McGillis, January 12, 1995. Reported: *Jebnoun v. Canada (Minister of Citizenship and Immigration)* (1995), 28 Imm. L.R. (2d) 67 (F.C.T.D.).

[28] *Aros, Angelica Elizabeth Navarro* v. *M.C.I.* (F.C.T.D., no. IMM-4480-96), MacKay, February 11, 1998.

[29] See, for example, *Ravji, Shahsultan Meghji v. M.E.I.* (F.C.T.D., no. A-897-92), McGillis, August 4, 1994 (the particular harm in question should have been considered by the Refugee Division in its assessment of cumulative acts).

[30] See, for example: *Gomez-Rejon, Bili v. M.E.I.* (F.C.T.D., no. IMM-470-93), Joyal, November 25, 1994, at 3 and 8; *Chen, supra,* footnote 7, at 5; and *Karpounin, Maxim Nikolajevitsh v. M.E.I.* (F.C.T.D., no. IMM-7368-93), Jerome, March 10, 1995. In *Rawji, Riayz v. M.E.I.* (F.C.T.D., no. IMM-5929-93), Gibson, November 25, 1994, where crime had befallen the claimant and police had refused to investigate unless bribed, the Court indicated, at 2, that neither persecution nor nexus to a Convention ground was involved. See also Chapter 4, section 4.7. In *Kaur, Biba v. M.C.I.* (F.C.T.D., no. IMM-305-96), Jerome, January 17, 1997, the claimant had been raped while in detention. The Refugee Division characterized her as a "random victim of violence", finding no nexus to a Convention ground (and also no well-foundedness), but the Court held that the mistreatment "... was a direct consequence of her detention for political reasons". (at 2)

In *Mousavi-Samani, Nasrin v. M.C.I.* (F.C.T.D., no. IMM-4674-96), Heald, September 30, 1997, the claimants had exposed fraud perpetrated by state officials, and feared retaliation and prosecution. As in *Rawji*, the Refugee Division had found both persecution and nexus to be lacking, and the Court upheld these findings.

[31] See, for example, *Dragulin, Constantin Marinescu v. S.G.C.* (F.C.T.D., no. IMM-46-94), Rouleau, December 23, 1994, at 3-5; and *Njoko, Tubila v. M.E.I.* (F.C.T.D., no. A-1698-92), Jerome, January 25, 1995, at 2.

[32] *Ansar, Iqbal* v. *M.C.I.* (F.C.T.D., no. IMM-4124-97), Campbell, July 22, 1998.

3.1.1.5. Agent of Persecution

Serious human rights violations may in fact issue not only from higher authorities of the state, but also from subordinate state authorities, or from persons who are not attached to the government; and whichever is the case, the Convention may apply. In order to be categorized as persecution, the harm need not emanate from the state; and the state need not be involved or be complicit in the perpetration of the harm.[33]

The fact that those who inflict mistreatment are schoolchildren and schoolyard bullies is not relevant to the question of whether the mistreatment amounts to persecution.[34] Similarly, serious mistreatment inflicted by teenagers upon a minor claimant may not reasonably be regarded as mere pranks.[35]

For more regarding the role of the state with respect to mistreatment of a claimant, see Chapter 6.

3.1.2. Cumulative Acts of Discrimination and/or Harassment

A given episode of mistreatment may constitute discrimination or harassment, yet not be serious enough to be regarded as persecution.[36] Indeed, a finding of discrimination rather than persecution is within the jurisdiction of the CRDD.[37] Even so, acts of harassment, none amounting to persecution individually, may cumulatively constitute persecution.[38] Where the claimant has experienced more than one incident of mistreatment, the Refugee Division may err if it only looks at each incident separately.[39] Moreover, the Court has also commented on the need to consider whether the repeated incidents of harassment in the past may lead to a serious possibility of persecution in the future.[40]

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[33] *Ward, supra,* footnote 2, at 709, 717, 720-1; *Chan* (S.C.C.), *supra,* footnote 4, per La Forest (dissenting) at 630.

[34] *Bougai, Zoia (a.k.a. Bougai, Zoya) v. M.C.I.* (F.C.T.D., no. IMM-4966-94), Gibson, June 15, 1995, at 6.

[35] *Malchikov, Alexander v. M.C.I.* (F.C.T.D., no. IMM-1673-95), Tremblay-Lamer, January 18, 1996, at 6 (French version).

[36] *Moudrak, Vanda* v. *M.C.I.* (F.C.T.D. no. IMM-1480-97), Teitelbaum, April 1, 1998.

[37] *Valdes, Roberto Manuel Olivares* v. *M.C.I.* (F.C.T.D., no. IMM-1902-97), Pinard, April 24, 1998.

[38] *Madelat, Firouzeh v. M.E.I.*, Mirzabeglui, Maryam v. M.E.I. (F.C.A., nos. A-537-89 and A-538-89), MacGuigan, Mahoney, Linden, January 28, 1991; *Retnem, Rajkumar v. M.E.I.* (F.C.A., no. A-470-89), MacGuigan, Décary, Pratte (dissenting), May 6, 1991. Reported: *Retnem v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 317 (F.C.A.), at 319; *Iossifov, Svetoslav Gueorguiev v. M.E.I.* (F.C.T.D., no. A-854-92), McKeown, December 8, 1993, at 2.

[39] *El Khatib, supra,* footnote 6, at 3; *Nina, Razvan v. M.C.I.* (F.C.T.D., no. A-725-92), Cullen, November 24, 1994, at 9. For an examination of cumulative acts in the context of an internal flight alternative, see Chapter 8, section 8.4.1.

[40] *Kadhm, Suhad Mohamed* v. *M.C.I.* (F.C.T.D., no. IMM-652-97), Muldoon, January 8, 1998.

It is appropriate to consider both the actions of the government against the individual claimant and the overall atmosphere created by the state's intolerance.[41]

See also paragraphs 53, 55, 67 and 201 of the UNHCR *Handbook*.

3.1.3. Forms of Persecution

3.1.3.1. Some Judicial Observations

It is impossible to compile an exhaustive catalogue of forms of persecution. Furthermore, whether particular harm constitutes persecution may depend upon the facts of the individual case. Nevertheless, here are some of the more instructive observations that emerge from the case law. (NOTE: The statements which follow should be approached with caution. To obtain context and understand the statements fully, the reader should consult the cases on which they are based.)

- Torture, beatings and rape are prime examples of persecution.[42]
- The term "discrimination" would seem to describe poorly behaviour which includes acts of violence and death threats.[43]
- Death threats may constitute persecution even if the persons making the threats refrain from carrying them out.[44] Whether death threats do amount to acts of persecution depends upon the personal circumstances of the claimant.[45]
- When imposed for certain offences, the death penalty may not constitute persecution.[46]
- Forced or strongly coerced sterilization constitutes persecution, whether the victim is a woman[47] or a man.[48] Forced abortion also constitutes persecution.[49]

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[41] *Rodriguez-Hernandez, Severino Carlos v. S.S.C.* (F.C.T.D., no. A-19-93), Wetston, January 10, 1994, at 3.

[42] *Chan v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 675; (1993), 20 Imm. L.R. (2d) 181 (C.A.), aff'd *Chan (S.C.C.), supra*, footnote 4, per Desjardins J.A. at 723. In *Mendoza, Elizabeth Aurora Hauayek v. M.C.I.* (F.C.T.D., no. IMM-2997-94), Muldoon, January 24, 1996, at 4: the Court said that rape "... is a form of brutality especially utilizabie for the humiliation and brutalization of women. It is not to be treated lightly ...". In *Arguello-Garcia, Jacobo Ignacio v. M.E.I.* (F.C.T.D., no. 92-A-7335), McKeown, June 23, 1993. Reported: *Arguello-Garcia v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 285 (F.C.T.D.), at 287, sexual abuse was part of the persecution suffered by the male claimant. But see *Cortez, supra*, footnote 23, where the rape was found not to constitute persecution. See also Chapter 9, section 9.3.3. for further discussion of measures such as beating.

[43] *Porto, Javier Cardozo v. M.E.I.* (F.C.T.D., no. A-1549-92), Noël, September 3, 1993, at 3.

[44] *Munoz, Alfonso La Rotta v. M.C.I.* (F.C.T.D., no. IMM-2207-93), Pinard, November 28, 1994, at 3.

[45] *Gidoiu, Ion v. S.S.C.* (F.C.T.D., no. IMM-2907-94), Wetston, April 6, 1995, at 1.

[46] *Antonio, supra*, footnote 5, at 11-12, where the offence in question was treason (in the form of espionage and sabotage); *Chu, Zheng-Hao v. M.C.I.* (F.C.T.D., no. IMM-5159-94), Jerome, January 17, 1996, at 5. See also *Singh, Tejinder Pal v. M.C.I.* (F.C.T.D., no. IMM-5294-97), Muldoon, December 23, 1997 (supplementary reasons), at paragraphs 9-13.

- Female circumcision is a "cruel and barbaric practice", a "horrific torture", and an "atrocious mutilation".[50]

- For "persecution" to exist within the meaning of the definition, it is not necessary for the subject to have been deprived of his freedom.[51]

- There may be persecution even if there is no physical harm or mistreatment.[52]

- Psychological violence may be an element in persecution.[53]

- The bringing of a trumped-up charge, and interference in the due process of law, may be aspects of persecutory treatment.[54]

- The fact that the claimant, along with all of his or her co-nationals, suffers curtailment of freedom of speech, in and of itself does not amount to persecution.[55]

- Barring one claimant from obtaining citizenship and from taking part in political activities, and barring a second claimant (a citizen) from voting and from otherwise participating in the political process, did not constitute persecution, where the claimants enjoyed numerous other rights.[56]

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[47] *Cheung, supra,* footnote 3, at 324, per Linden J.A.: "the forced sterilization of women is a fundamental violation of basic human rights. It violates Articles 3 and 5 of the *United Nations Universal Declaration of Human Rights.*" With respect to sterilization and abortion, see Chapter 9, section 9.3.7., where the one-child policy in China is discussed.

[48] *Chan* (S.C.C.), *supra,* footnote 4, per La Forest J. (dissenting) at 636. The majority in the Supreme Court did not expressly comment on the issue, although Mr. Justice Major appeared to assume that forced sterilization would indeed constitute persecution: see, for example, 658 and 672-673. See also *Chan* (F.C.A.), *supra,* footnote 42, per Heald J.A. at 686, and per Mahoney J.A. (dissenting) at 704.

[49] *Lai, Quang v. M.E.I.* (F.C.T.D., no. IMM-307-93), McKeown, May 20, 1994, at 2.

[50] *Annan v. Canada (Minister of Citizenship and Immigration),* [1995] 3 F.C. 25 (T.D.).

[51] Oyarzo v. Canada (Minister of Employment and Immigration), [1982] 2 F.C. 779 (C.A.), at 782, per Heald J. See also *Amayo v. Canada (Minister of Employment and Immigration),* [1982] 1 F.C. 520 (C.A.); and *Asadi, Sedigheh v. M.C.I.* (F.C.T.D., no. IMM-1921-96), Lutfy, April 18, 1997, at 3.

[52] *Ammery, Poone v. S.S.C.* (F.C.T.D., no. IMM-5404-93), MacKay, May 11, 1994, at 4. *Nejad,* supra, footnote 9.

[53] *Bragagnini-Ore, Gianina Evelyn v. S.S.C.* (F.C.T.D., no. IMM-2243-93), Pinard, February 4, 1994, at 2.

[54] *Kicheva, Zorka v. M.E.I.* (F.C.T.D., no. A-625-92), Denault, December 23, 1993, at 2.

[55] *Ling, Che Keung v. M.E.I.* (F.C.T.D., no. 92-A-6555), Muldoon, May 20, 1993.

[56] *Sulaiman, Hussaine Hassan v. M.C.I.* (F.C.T.D., no. IMM-525-94), MacKay, March 22, 1996, at 6-7 and 11-12.

- Punishment for violation of a law concerning dress may constitute persecution.[57] However, in recent case law, the Court has found that the punishment of lashing for improper dress in Saudi Arabia did not amount to persecution but rather prosecution.[58]

- Denial of a right of return may constitute an act of persecution.[59]

- Simple statelessness does not make one a Convention refugee.[60]

- Economic penalties may be an acceptable means of enforcing a state policy,[61] where the claimant is not deprived of his or her right to earn a livelihood.[62]

- Where the state interferes substantially with the claimant's ability to find work, the possibility of the claimant's finding illegal employment is not an acceptable remedy.[63]

- Permanently depriving an educated professional of his or her accustomed occupation and limiting the person to farm and factory work constituted persecution.[64]

- By itself, confiscation of property is not sufficiently grave to constitute persecution.[65]

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[57] *Namitabar v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 42 (T.D.), at 47; *Fathi-Rad, Farideh v. S.S.C.* (F.C.T.D., no. IMM-2438-93), McGillis, April 13, 1994, at 4-5. Compare *Hazarat, Ghulam v. S.S.C.* (F.C.T.D., no. IMM-5496-93), MacKay, November 25, 1994, at 3-4. See the discussion of "Restrictions Upon Women" in section 9.3.8.1 of Chapter 9. In *Canada (Secretary of State) v. Namitabar* (F.C.A., no. A-709-93), Décary, Hugessen, Desjardins, October 28, 1996, the Court overturned the Trial Division on the basis that the CRDD credibility findings were not ambiguous. With respect to the issue of wearing veils in Iran, the Court was of the view that "the Refugee Division may have expressed itself incorrectly [but] that has no importance in the case at bar since the female [claimant] voluntarily complied with the clothing code and did not even display reluctance to do so. See also *Rabbani, Farideh v. M.C.I.* (F.C.T.D., no. IMM-2032-96), McGillis, June 3, 1997, at 2."

[58] *Daghmash, Mohamed Hussein Moustapha* v. *M.C.I.* (F.C.T.D., no. IMM-4302-97), Lutfy, June 19, 1998.

[59] *Maarouf v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 723 (T.D.), at 738. See also *Abdel-Khalik, Fadya Mahmoud v. M.E.I.* (F.C.T.D., no. IMM-883-93), Reed, January 31, 1994. Reported: *Abdel-Khalik v. Canada (Minister of Employment and Immigration)* (1994), 23 Imm. L.R. (2d) 262 (F.C.T.D), at 263. But see *Altawil, Anwar Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2365-95), Simpson, July 25, 1996.

[60] *Arafa, Mohammed v. M.E.I.* (F.C.T.D., no. A-663-92), Gibson, November 3, 1993, at 4-5. As to the possibility that harsh policies on the granting of citizenship, or limitations imposed upon permanent residents, might constitute persecution, see *Falberg, Victor v. M.C.I.* (F.C.T.D., no. IMM-328-94), Richard, April 19, 1995, at 4.

[61] *Cheung, supra*, footnote 3, at 323; *Chan* (F.C.A.), *supra*, footnote 42, at 688, per Heald J.A.; *Lai, supra*, footnote 49, at 3.

[62] *Lin, Qu Liang v. M.E.I.* (F.C.A., no. 93-A-142), Rouleau, July 20, 1993. Reported: *Lin v. Canada (Minister of Employment and Immigration)* (1993), 24 Imm. L.R. (2d) 208 (F.C.T.D.), at 211.

[63] *Xie, Sheng v. M.E.I.* (F.C.T.D., no. A-1573-92), Rothstein, March 3, 1994, at 5-6.

[64] *He, Shao Mei v. M.E.I.* (F.C.T.D., no. IMM-3024-93), Simpson, June 1, 1994. Reported: *He v. Canada (Minister of Employment and Immigration)* (1994), 25 Imm. L.R. (2d) 128 (F.C.T.D.).

[65] *Ramirez, Rosa Etelvina v. S.G.C.* (F.C.T.D., no. IMM-1192-94), Rouleau, December 9, 1994, at 5. See also *Chen*, at 4.

- Serious economic deprivations may be components of persecution.[66]
- Extortion may be one of the indicia of persecution, depending upon the reason for the extortion and the motivation of the claimant in paying.[67]
- A child who would experience hardships including deprivation of medical care, education opportunities, employment opportunities and food would suffer concerted and severe discrimination, amounting to persecution.[68]
- Education is a basic human right and a nine-year-old claimant who could have avoided persecution only by refusing to go to school was deemed to be a Convention refugee.[69]
- It is not an act of persecution to ban certain groups of children from attending public schools, if they are permitted to have their own schools.[70]
- Forcing a woman into a marriage violates one of her basic human rights.[71]
- An impediment to the claimant's marrying in her homeland did not constitute persecution.[72]
- Legal restrictions allowing certain categories of people to settle only in certain areas did not constitute persecution.[73]
- A law which requires a person to forsake the principles or practices of his or her religion is patently persecutory, so long as the principles or practices in question are not

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[66] *Lerer, Iakov v. M.C.I.* (F.C.T.D., no. IMM-7438-93), Cullen, January 5, 1995, at 5-6.

[67] Sinn*athamby, Jayasrikanthan v. M.E.I.* (F.C.T.D., no. IMM-179-93), Noël, November 2, 1993. Reported: *Sinnathamby v. Canada (Minister of Employment and Immigration)* (1993), 23 Imm. L.R. (2d) 32 (F.C.T.D.) at 36. See also: *Mortera, Senando Layson v. M.E.I.* (F.C.T.D., no. A-1084-92), McKeown, December 8, 1993; *Vasudevan, Prakash v. S.S.C.* (F.C.T.D., no. IMM-81-94), Gibson, July 11, 1994; *Gnanam, Ulakanayaki v. M.E.I.* (F.C.T.D., no. IMM-2165-93), Simpson, August 31, 1994 (reasons signed March 31, 1995), at 2 and 4; *Sivapoosam, Sivakumar v. M.C.I.* (F.C.T.D., no. IMM-2674-95), Reed, June 19, 1996, at 4-5; and *Srithar, Suntharalingam v. M.C.I.* (F.C.T.D., no. IMM-158-97), Tremblay-Lamer, October 10, 1997, at 4-5 (extortion by corrupt military personnel).

[68] *Cheung, supra,* footnote 3, at 325.

[69] *Ali, Shaysta-Ameer v. M.C.I.* (F.C.T.D., no. IMM-3404-95), McKeown, October 30, 1996. Reported: *Ali v. Canada (Minister of Citizenship and Immigration)* (1996), 36 Imm. L.R. (2d) 34 (F.C.T.D.).

[70] *Thathaal, Sabir Hussain v. S.S.C.* (F.C.T.D., no. A-1644-92), McKeown, December 15, 1993, at 2. Appeal to the Federal Court of Appeal dismissed April 16, 1996 (F.C.A., no. A-724-93).

[71] *Vidhani v. Canada (Minister of Citizenship and Immigration),* [1995] 3 F.C. 60, (T.D.), at 65.

[72] *Frid, Mickael v. M.C.I.* (F.C.T.D., no. IMM-6694-93), Rothstein, December 15, 1994, at 3.

[73] *Igumnov, Sergei v. M.C.I.* (F.C.T.D., no. IMM-6993-93), Rouleau, December 16, 1994, at 3-5. See also *Gutkovski, supra,* footnote 17, at 2 and 4.

unreasonable.[74] Sanctions such as a short detention, fine or re-education term, which might have been imposed upon the claimant for practising his religion or belonging to a particular religious community, were serious measures of discrimination and constituted persecution.[75]

- Injury to pride and political sensibilities did not amount to a violation of security of the person.[76]
- Lamentable rough treatment, involving detention and interrogation, in a country that is experiencing serious terrorists activity, does not of itself amount to persecution.[77]

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[74] *Kassatkine, Serguei v. M.C.I.* (F.C.T.D., no. IMM-978-95), Muldoon, August 20, 1996, at 4. And see *Kazkan, Shahrokh Saeedi v. M.C.I.* (F.C.T.D., no. IMM-1313-96), Rothstein, March 20, 1997.

[75] *Chen, Shun Guan v. M.C.I.* (F.C.T.D., no. IMM-1433-96), Lutfy, January 31, 1997, at 2-3, citing the UNHCR *Handbook*, paragraph 72.

[76] *Lin, supra,* footnote 62, at 211.

[77] *Abouhalima, Sherif* v. *M.C.I.* (F.C.T.D., no. IMM-835-97), Gibson, January 30, 1998.

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CHAPTER 4

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CHAPTER 4

4. GROUNDS OF PERSECUTION

4.1. GENERALLY

The definition of a Convention refugee states that a claimant's fear of persecution must be "by reason of" one of the five enumerated grounds - that is race, religion, nationality, membership in a particular social group and political opinion. There must be a link between the fear of persecution and one of the five grounds.[1]

It is for the Refugee Division to determine the ground, if any, applicable to the claimant's fear of persecution.[2] This is consistent with the overall obligation of the Refugee Division to determine whether the claimant is a Convention refugee. If a claimant identifies the ground(s) which he or she thinks are applicable to the claim, the Refugee Division is not limited to considering only those grounds and must consider the grounds of the definition as raised by the evidence in making their determination. However, once the Refugee Division has found that the claimant's fear of persecution is by reason of one of the grounds it is not necessary to go on to consider all of the other grounds.

When determining the applicable grounds, the relevant consideration is the perception of the persecutor. The persecutor may perceive that the claimant is a member of a certain race, nationality, religion, or particular social group or holds a certain political opinion and the claimant may face a reasonable chance of persecution because of that perception. This perception may not conform with the real situation.[3]

Reference should be made to the Guidelines on *Women Refugee Claimants Fearing Gender-Related Persecution:* Update issued by the Chairperson pursuant to section 65(3) of the *Immigration Act* on November 25, 1996, for an analysis of the grounds as they relate to gender-related persecution.[4]

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1 *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85 at 732; and *Chan v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 675; (1993), 20 Imm. L.R. (2d) 181 (C.A), at 689-690 and 692-693. In *Gomez, Mario Alonso Martinez* v. *M.C.I.* (F.C.T.D., no. IMM-3785-97), Richard, June 23, 1998, the Court found that the CRDD failed to assess the evidence of police mistreatment of the claimant, a homosexual, in relation to a Convention ground. A determination of the nexus is relevant to the assessment of whether an IFA exists.

2 *Ward, ibid.*, at 745.

3 *Ward, supra*, footnote 1, at 747.

4 In *Narvaez v. Canada (Minister of Citizenship and Immigration)*, [1995] 2 F.C. 55 (T.D.), at 62, the Court stated: "While the guidelines are not law, they are authorized by subsection 65(3) of the *Act*, and intended to be followed unless circumstances are such that a different analysis is appropriate." See also *Fouchong, Donna Hazel v. S.S.C.* (F.C.T.D., no. IMM-7603-93), MacKay, November 18, 1994. Reported: *Fouchong v. Canada (Secretary of State)* (1994), 26 Imm. L.R. (2d) 200 (F.C.T.D.); *Hazarat, Ghulam v. S.S.C.* (F.C.T.D., no. IMM-5496-93), MacKay, November 25, 1994; and *Pour, Malek Mohammad Nagmeh Abbas v. M.C.I.* (F.C.T.D., no. IMM-3650-95), Gibson, June 6, 1996.

4.2. RACE

There is currently no Federal Court jurisprudence that provides a detailed analysis of this ground of persecution. Reference should be made to the UNHCR *Handbook*, at paragraphs 68 to 70, for a description of this ground. According to the *Handbook*, "race ... has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as 'races' in the common usage." (paragraph 68)

The Court of Appeal has said that where race is one of the defining elements of a group to which the claimant belongs (and fears persecution on account of) then the ground of persecution is race. It is not necessary to look at other grounds.[5]

4.3. NATIONALITY

This ground is discussed in the UNHCR *Handbook* at paragraphs 74 to 76. The *Handbook* points out that "nationality" in this case encompasses not only "citizenship" but it refers also to ethnic or linguistic groups. According to the *Handbook* this ground may overlap with race.

The Court in *Hanukashvili,*[6] citing Lorne Waldman, noted the difference between "nationality" as a ground and "nationality" meaning citizenship. When used as one of the five grounds, "nationality" does not mean the same thing as "citizenship"; however it has the same meaning as citizenship for the purpose of subparagraph 2(1)(a)(i) of the *Immigration Act*.

4.4. RELIGION

Persecution by reason of a claimant's religion may take many forms. Freedom of religion includes the right to manifest the religion in public, or private, in teaching, practice, worship and observance.[7]

The Federal Court Trial Division in *Kassatkine*[8] considered the case of a religion which has public proselytizing as one of its tenets. In this case, proselytizing was contrary to the law. The Court stated:

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[5] *Veeravagu, Uthaya Kumar v. M.E.I.* (F.C.A., no. A-630-89), Hugessen, Desjardins, Henry, May 27, 1992, at 2.

[6] *Hanukashvili, Valeri v. M.C.I.* (F.C.T.D., no. IMM-1732-96), Pinard, March 27, 1997. Although Isreal did not recognize the claimants as having Jewish nationality, they were citizens of Israel and as such the CRDD had properly considered the claims as being against Israel, the country of nationality pursuant to section 2(1)(a)(i) of the Act.

[7] *Fosu, Monsieur Kwaku v. M.E.I.* (F.C.T.D., no. A-35-93), Denault, November 16, 1994. Reported: *Fosu v. Canada (Minister of Employment and Immigration)* (1994), 27 Imm. L.R. (2d) 95 (F.C.T.D.), at 97, where the Court adopted the *Handbook*'s interpretation of freedom of religion. See also *Chabira, Brahim v. M.E.I.* (F.C.T.D., no. IMM-3165-93), Denault, February 2, 1994. Reported: *Chabira v. Canada (Minister of Employment and Immigration)* (1994), 27 Imm. L.R. (2d) 75 (F.C.T.D.), where the claimant was persecuted for offending against his girlfriend's Islamic mores; and *Bediako, Isaac v. S.G.C.* (F.C.T.D., no. IMM-2701-94), Gibson, February 22, 1995, where the Court deals briefly with the issue of justified restrictions on religious practices.

[8] *Kassatkine, Serguei v. M.C.I.* (F.C.T.D., no. IMM-978-95), Muldoon, August 20, 1996, at 4.

> A law which requires a minority of citizens to breach the principles of their religion . . . is patently persecutory. One might add, so long as these religious tenets are not unreasonable as, for example, exacting human sacrifice or the taking of prohibited drugs as a sacrament.

There have been cases dealing with the issue of persecution of members of the Ahmadi religion in Pakistan and the application of Ordinance XX. For these cases and a discussion of the nature of the enforcement of Ordinance XX see Chapter 9, section 9.3.8.2.

The UNHCR *Handbook* can be referred to at paragraphs 71 to 73.

4.5. PARTICULAR SOCIAL GROUP

The Supreme Court of Canada in *Ward* provided an interpretative foundation for the meaning of the ground of "membership in a particular social group". Mr. Justice LaForest stated as follows:

> The meaning assigned to "particular social group" in the *Act* should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.[9]

The Court further indicated that the tests proposed in *Mayers*,[10] *Cheung*,[11] and *Matter of Acosta*[12] provided a "good working rule" to achieve the above-noted result and identified three possible categories of particular social groups that emerge from these tests:

1. Groups defined by an innate or unchangeable characteristic;
2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
3. groups associated by a former voluntary status, unalterable due to its historical permanence.[13]

The Court went on to state:

> The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also

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[9] *Ward*, *supra*, footnote 1, at 739.

[10] *Canada (Minister of Employment and Immigration) v. Mayers*, [1993] 1 F.C. 154 (C.A.).

[11] *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.).

[12] *Matter of Acosta*, Interim Decision 2986, 1985 WL 56042 (BIA-United States).

[13] *Ward*, *supra*, footnote 1, at 739.

> relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.[14]

In setting out three possible categories of particular social groups, the Court made it clear that not all groups of persons will be within the Convention refugee definition. There are some groups from which the claimant can, and should be expected to, dissociate him- or herself because membership therein is not fundamental to the human dignity of the claimant.[15]

A distinction must be drawn between a claimant who fears persecution because of what he or she does as an individual and a claimant who fears persecution because of his or her membership in a particular social group. It is the membership in the group which must be the cause of the persecution and not the individual activities of the claimant.[16] This is sometimes referred to as the "is versus does" distinction.

A particular social group cannot be defined solely by the fact that a group of persons are objects of persecution.[17] The rationale for this proposition is that the Convention refugee definition requires that the persecution be "by reason of" one of the grounds, including particular social group.

Subsequent to the *Ward* decision, the Court of Appeal in *Chan*[18] interpreted the three possible categories of particular social groups. The majority of the Court, in concurring judgments, held that the terms "voluntary association" and "voluntary status" referred to in *Ward* categories two and three (above) refer to active or formal association. The dissenting judgment disagreed with this interpretation.

Chan was then heard by the Supreme Court of Canada[19] and the majority of the Supreme Court concluded that the claimant had failed to present evidence on the objective element as to

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[14] *Ward, supra*, footnote 1, at 739.

[15] *Ward, supra*, footnote 1, at 738. Thus the Court held, at 745, that an association, such as the Irish National Liberation Army (INLA), that is committed to attaining political goals by any means, including violence, does not constitute a particular social group, as requiring its members to abandon this objective "does not amount to an abdication of their human dignity."

[16] *Ward, supra*, footnote 1, at 738-739. Thus the Court held, at 745, that although the claimant's membership in INLA placed him in the circumstances that led to his fear, the fear itself was based on his action, not on his affiliation.

[17] *Ward, supra*, footnote 1, at 729-733. In *Mason, Rawlson v. S.S.C.* (F.C.T.D., no. IMM-2503-94), Simpson, May 25, 1995, the claimant feared being killed by drug "thugs" because he opposed the drug trade, and informed and testified against his brother in criminal proceedings; the Court held that "persons of high moral fibre who opposed the drug trade" were not a particular social group as this was not a pre-existing group whose members were subsequently persecuted. See also footnotes 41 and 56; and *Marvin, Mejia Espinoza v. M.C.I.* (F.C.T.D., no. IMM-5033-93), Joyal, January 10, 1995, where the Court found, in the circumstances of that case, that reporting drug traffickers to the Costa Rican authorities was not an expression of political opinion. For further discussion of victims of criminality and nexus to the grounds, see Chapter 4, section 4.7.

[18] *Chan* (C.A), *supra*, footnote 1.

[19] *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593.

the well-foundedness of his fear of persecution (forced sterilization).[20] The majority did not address the issue of particular social group or whether there was an applicable ground in this case.[21] The dissenting judgment by Mr. Justice LaForest, however, dealt extensively with the ground of particular social group. The minority's comments on this issue carry considerable persuasive authority, inasmuch as they were not contradicted by the majority, and represent the views of a significant number of Supreme Court Justices. Mr. Justice LaForest (who wrote the judgment in *Ward* clarified some of the issues which were raised in *Ward*:

1. The *Ward* decision enunciated a working rule and "not an unyielding deterministic approach to resolving whether a refugee claimant could be classified within a particular social group."[22] The paramount consideration in determining a particular social group is the "general underlying themes of the defence of human rights and anti-discrimination."[23]

2. The "is versus does" distinction was not intended to replace the *Ward* categories. There must be proper consideration of the context in which the claim arose.[24]

3. With respect to category two of the *Ward* categories and the position taken by the Court of Appeal in *Chan* that this category required an active association between members of the group, Mr. Justice LaForest stated: "In order to avoid any confusion on this point let me state incontrovertibly that a refugee alleging membership in a particular social group does not have to be in voluntary association with other persons similar to him- or herself."[25]

Some examples of particular social groups identified by the jurisprudence are as follows:

1. the family;[26]

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[20] *Chan* (S.C.C.), *ibid.*, at 672.

[21] *Chan* (S.C.C.), *supra*, footnote 19, at 658 and 672.

[22] *Chan* (S.C.C.), *supra*, footnote 19, at 642.

[23] *Chan* (S.C.C.), *supra*, footnote 19, at 642.

[24] In *Chan* (S.C.C.), *supra*, footnote 19, at 643-644, Mr. Justice LaForest commented that having children can be classified as what one does rather than who one is. In context, however, having children makes a person a parent which is what one is.

[25] *Chan* (S.C.C.), *supra*, footnote 19, at 644-645.

[26] *Al-Busaidy, Talal Ali Said v. M.E.I.* (F.C.A., no. A-46-91), Heald, Hugessen, Stone, January 17, 1992. Reported: *Al-Busaidy* v. Canada (Minister of Employment and Immigration) (1992), 16 Imm. L.R. (2d) 119 (F.C.A.); *Pour-Shariati v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 767 (T.D.), at 774-775; *Casetellanos v. Canada (Solicitor General)*, [1995] 2 F.C. 190 (T.D.). In *Calero, Fernando Alejandro (Alejandeo) v. M.E.I.* (F.C.T.D., no. IMM-3396-93), Wetston, August 8, 1994, the Court found no nexus for two families fleeing death threats from drug traffickers; but see *Velasquez, Liliana Erika Jaramillo v. M.C.I.* (F.C.T.D., no. IMM-4378-93), Noël, December 21, 1994, which suggests, possibly, a different conclusion may be warranted.

In *Rodriguez, Ana Maria v. M.C.I.* (F.C.T.D., IMM-4573-96), Heald, September 26, 1997, the claimant was threatened with harm because her husband was involved in the mafia's drug related business. The Court held that the CRDD did not err in holding that the difficulties experienced by family members of those persecuted

2. homosexuals (sexual orientation);[27]

3. trade unions;[28]

4. the poor;[29]

5. wealthy persons or landlords were found by the Trial Division not to be particular social groups.[30] The Court focused on the fact that these groups were no longer being persecuted although they had been in the past.[31]

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for non-Convention reasons – if those difficulties are solely by reason of their connection with the principal target – are not covered by the Convention.

This rationale was followed in *Klinko, Alexander* v. *M.C.I.* (F.C.T.D., no. IMM-2511-97), Rothstein, April 30, 1998, where the Court held that when the primary victim of persecution does not come within the Convention refugee definition, any derivative Convention refugee claim based on family group cannot be sustained (*Klinko* was overturend by the Federal Court of Appeal on other grounds: *Klinko, Alexander v. M.C.I.* (F.C.A., A-321-98), Létourneau, Nöel, Malone, February 22, 2000). See also *Serrano, Roberto Flores v. M.C.I.* (F.C.T.D., no. IMM-2787-98), Sharlow, April 27, 1999, where the Court agreed to certify a question on the topic. See also Chapter 9, section 9.4.

[27] *Pizarro, Claudio Juan Diaz v. M.E.I.* (F.C.T.D., no. IMM-2051-93), Gibson, March 11, 1994, at 3-4; this case applied *Ward, supra*, footnote 1. See also *Gomez-Rejon, Bili v. M.E.I.* (F.C.T.D., no. IMM-470-93), Joyal, November 25, 1994; and *Tchernilevski, Taras v. M.C.I.* (F.C.T.D., no. IMM-5088-94), Noël, June 8, 1995. Reported: *Tchernilevski v. Canada (Minister of Citizenship and Immigration)* (1995), 30 Imm. L.R. (2d) 67 (F.C.T.D.).

[28] *Rodriguez, Juan Carlos Rodriguez v. M.E.I.* (F.C.T.D., no. IMM-4109-93), Dubé, October 25, 1994, at 2 (in *obiter*).

[29] *Sinora, Frensel v. M.E.I.* (F.C.T.D., no. 93-A-334), Noël, July 3, 1993.

[30] *Mortera, Senando Layson v. M.E.I.* (F.C.T.D., no. A-1084-92), McKeown, December 8, 1993, at 2. See also *Wilcox, Manuel Jorge Enrique Tataje v. M.E.I.* (F.C.T.D., no. A-1282-92), Reed, November 2, 1993; *Karpounin, Maxim Nikolajevitsh v. M.E.I.* (F.C.T.D., no. IMM-7368-93), Jerome, March 10, 1995; *Bhowmick, Sankar v. M.C.I.* (F.C.T.D., no. IMM-3889-94), Tremblay-Lamer, May 1, 1995; *Vetoshkin, Nikolay v. M.C.I.* (F.C.T.D., no. IMM-4902-94), Rothstein, June 9, 1995; and *Montchak, Roman* v. *M.C.I.* (F.C.T.D., no. IMM-3068-98), Evans, July 7. 1999.

However, in *Randhawa, Sarbjit* v. *M.C.I.* (F.C.T.D., no. IMM-2474-97), Campbell, February 2, 1998, it was held that "considering the extensive evidence of persecution of Sikhs in India the CRDD made an erroneous finding of fact in compartmentalizing the [claimant] as a Sikh from the fact that he is a prominent wealthy person", and directed the Board to consider the claim on the basis of membership in the social group of "prominent wealthy Sikhs".

[31] In *Ward, supra*, footnote 1, at 731, the Court said: "The persecution in the 'Cold War cases' was imposed upon the capitalists not because of their contemporaneous activities but because of their past status as ascribed to them by the Communist leaders." Thus, in *Lai, Kai Ming v. M.E.I.* (F.C.A., no. A-792-88), Marceau, Stone, Desjardins, September 18, 1989. Reported: *Lai v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 245 (F.C.A.), at 245-246, the Court implicitely accepted that "persons with capitalist backgrounds" constitute a particular social group in the context of China. In *Karpounin, supra*, footnote, 30, however, the Court stated at 4: "... it does not necessarily follow that, merely because the historical underpinning of including the use of the term 'particular social group' as found in the Convention, was based on the desire to protect capitalists and independent businessmen fleeing Eastern Bloc persecution during the cold war, should it lead to the conclusion that the [claimant] in this case was persecuted for that very reason." The CRDD had found that the claimant, an independent businessman, was targeted because of the size of his bank

6. women subject to domestic abuse;[32]

7. women forced into marriage without their consent;[33]

8. women who have been subjected to exploitation resulting in the violation of the person and who, in consequence of the exploitation have been tried, convicted and sentenced to imprisonment.[34]

9. new citizens of Israel who are women recently arrived from elements of the former Soviet Union and who are not yet well integrated into Israeli society, despite the generous support offered by the Israeli government, who are lured into prostitution and threatened and exploited by individuals not connected to government, and who can demonstrate indifference to their plight by front-line authorities to whom they would normally be expected to turn for protection;[35]

10. women subject to circumcision;[36]

11. persons subject to forced sterilization;[37]

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account and not because of his choice of occupation or the state of his conscience. See also *Soberanis, Enrique Samayoa v. M.C.I.* (F.C.T.D., no. IMM-401-96), Tremblay-Lamer, October 8, 1996, where "small business proprietors victimized by extortionists acting in concert with police authorities" was found not to be a particular social group.

[32] In *Narvaez, supra*, footnote 4, Mr. Justice McKeown referred extensively to *Ward, supra*, footnote 1 and to the IRB Chairperson's Gender Guidelines in finding "women subject to domestic abuse in Ecuador" to constitute a particular social group; the judgment did not address the issue of whether the group can be defined by the persecution feared. (In *Ward, supra*, footnote 1, at 729-733, the Court rejected the notion that "particular social group" could be defined solely by the persecution feared, i.e., the common victimization.) The reasoning in *Narvaez, supra*, footnote 4, was explicitly adopted in the decision of *Diluna, Roselene Edyr Soares v. M.E.I.* (F.C.T.D., no. IMM-3201-94), Gibson, March 14, 1995. Reported: *Diluna v. Canada (Minister of Employment and Immigration)* (1995), 29 Imm. L.R. (2d) 156 (F.C.T.D.), where the Court held that the CRDD erred in not finding that "women subject to domestic violence in Brazil" constitute a particular social group.

[33] *Vidhani v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 60 (T.D.), where the Court held that such women have suffered a violation of a basic human right (the right to enter freely into marriage) and would appear to fall within the first category identified in *Ward, supra*, footnote 1.

[34] *Cen v. Canada (Minister of Citizenship and Immigration)*, [1996] 1 F.C. 310 (T.D.), at 319, where the Court stated the group "might be" so defined.

[35] *Litvinov, Svetlana v. S.C.C.* (F.C.T.D., no. IMM-7488-93), Gibson, June 30, 1994, at 4. Note that Justice Gibson indicated that the "group might be defined" in this way.

[36] *Annan v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 25 (T.D.), where the Court implicitly seemed to accept that the claim was grounded.

[37] *Cheung, supra*, footnote 11, at 322, ("women in China who have one child and are faced with forced sterilization"). But note *Liu, Ying Yang v. M.C.I.* (F.C.T.D., no. IMM-4316-94), Reed, May 16, 1995, where the Court found that the claimant had shown no subjective fear of persecution as a result of the threat of sterilization and there was no evidence she objected to the government policy. See also *Chan* (S.C.C.), *supra*, footnote 19, at 644-646, where La Forest J. (dissenting) formulates the group under *Ward*'s second category (see section 4.5. of this Chapter), as an association or group resulting from a "common attempt by its members to exercise a fundamental human right" (at 646), namely, "the basic right of all couples and individuals to

12. children of police officers who are anti-terrorist supporters;[38]

13. former fellow municipal employees terrified and terrorized by what they know about the ruthless, criminal mayor;[39]

14. educated women.[40]

15. "law abiding citizens" was held not to be a particular social group.[41]

4.6. POLITICAL OPINION

A broad and general interpretation of political opinion is "any opinion on any matter in which the machinery of state, government, and policy may be engaged".[42] However, this does not mean that only political opinions regarding the state will be relevant. As noted in Chapter 3, there is no requirement that the agent of persecution be the state.

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decide freely and responsibly the number, spacing and timing of their children." (at 646). For further discussion of China's one child policy, see Chapter 9, section 9.3.7.

[38] *Badran, Housam v. M.C.I.* (F.C.T.D., no. IMM-2472-95), McKeown, March 29, 1996.

[39] *Reynoso, Edith Isabel Guardian v. M.C.I.* (F.C.T.D., no. IMM-2110-94), Muldoon, January 29, 1996. Mr. Justice Muldoon stated that the claimant's group was defined by an innate or unchangeable characteristic; the Court acknowledged that this characteristic was one acquired later in life.

[40] *Ali, Shaysta-Ameer v. M.C.I.* (F.C.T.D., no. IMM-3404-95), McKeown, October 30, 1996. Reported: Ali v. *Canada (Minister of Citizenship and Immigration)* (1996), 36 Imm. L.R. (2d) 34 (F.C.T.D.) (the country of origin was Afghanistan).

[41] *Serrano, supra*, footnote 26. The Court certified a question on this issue.

[42] *Ward, supra*, footnote 1, at 746. The word "engaged" was interpreted in *Femenia, Guillermo v. M.C.I.* (F.C.T.D., no. IMM-3852-94), Simpson, October 30, 1995. The claimants asserted that their political opinion was that they opposed the existence of corrupt police and advocated their removal and prosecution. They argued that this was an opinion on a matter "in which the machinery of state, government and policy may be engaged." Madam Justice Simpson concluded, that the state is "engaged" in the provision of police services, but not in the criminal conduct of corrupt officers. In her view, that was not conduct officially sanctioned, condoned or supported by the state and therefore, the claimants' asserted political opinion did not come within the *Ward, supra*, footnote 1, characterization of political opinion. The Court of Appeal in *Klinko, supra*, footnote 26, rejected the approach followed by the Trial Division in *Femenia* as being too narrow an interpretation of *Ward*. The Court answered in the affirmative the following certified question:

> Does the making of a public complaint about widespread corrupt conduct by customs and police officials to a regional governing authority, and thereafter, the complainant suffering persecution on this account, when the corrupt conduct is not officially sanctioned, condoned or supported by the state, constitute an expression of political opinion as that term is understood in the definition of Convention refugee in subsection 2(1) of the Immigration Act?

See also *Berrueta, Jesus Alberto Arzola v. M.C.I.* (F.C.T.D., no. IMM-2303-95), Wetston, March 21, 1996, where the Court overturned the CRDD decision on the basis that the CRDD did not suitably analyze the facts to determine the issue of political opinion. With respect to corruption, the Court stated, at 2, that "[c]orruption is prevalent in some countries. To decry corruption, in some cases, is to strike at the core of such governments' authority."

The Supreme Court of Canada in *Ward* stated that there are two refinements to political opinion within the context of the Convention refugee definition.

The first is that "the political opinion at issue need not have been expressed outright."[43] The Court recognized that the claimant may not always articulate his or her beliefs and that the political opinion will be perceived from the claimant's actions or otherwise imputed to him or her.[44]

The second refinement in *Ward* is that the "political opinion ascribed to the claimant" by the persecutor "need not necessarily conform to the claimant's true beliefs."[45] In other words, the political opinion may not be correctly attributed to the claimant.

The Supreme Court makes it clear that it is the perception of the persecutor which is relevant. The question to be answered is: does the agent of persecution consider the claimant's conduct to be political or does it attribute political activities to him or her?[46]

The claimant does not have to belong to a political party[47] nor does the claimant have to belong to a group that has an official title, office or status[48] in order for there to be a determination that the claimant's fear of persecution is by reason of political opinion. The relevant issue is the persecutor's perception of the group and its activities, or of the individual and his or her activities.[49]

For a discussion of the ground of political opinion as it relates to laws of general application and, in particular, the dress code and military service (evasion/desertion) laws, see Chapter 9, sections 9.3.6 and 9.3.8.1.

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[43] *Ward, supra*, footnote 1, at 746.

[44] *Ward, supra*, footnote 1, at 746.

[45] *Ward, supra*, footnote 1, at 747.

[46] *Inzunza Orellana, Ricardo Andres v. M.E.I.* (F.C.A., no. A-9-79), Heald, Ryan, Kelly, July 25, 1979. Reported: *Inzunza v. Canada (Minister of Employment and Immigration)* (1979), 103 D.L.R. (3d) 105 (F.C.A.), at 109.

[47] *Armson, Joseph Kaku v. M.E.I.* (F.C.A., no. A-313-88), Heald, Mahoney, Desjardins, September 5, 1989. Reported: *Armson v. Canada (Minister of Employment and Immigration).* (1989), 9 Imm. L.R. (2d) 150 (F.C.A.), at 153.

[48] *Hilo, Hamdi v. M.E.I.* (F.C.A., no. A-260-90), Heald, Stone, Linden, March 15, 1991. Reported: *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 199 (F.C.A.), at 203.

[49] *Hilo, ibid.*, at 202-203 (re charitable group). See also *Bohorquez, Gabriel Enriquez v. M.C.I.* (F.C.T.D., no. IMM-7078-93), McGillis, October 6, 1994 (re lottery ticket cooperative); *Salvador (Bucheli), Sandra Elizabeth v. M.C.I.* (F.C.T.D., no. IMM-6560-93), Noël, October 27, 1994 (re witness to crime committed by paramilitary group); *Marvin, supra*, footnote 17, (re reporting of drug traffickers to authorities); *Kwong, Kam Wang (Kwong, Kum Wun) v. M.C.I.* (F.C.T.D., no. IMM-3464-94), Cullen, May 1, 1995 (re defiance of one-child policy) - but compare *Chan* (C.A.), *supra*, footnote 1, at 693-696, per Heald J.A., and at 721-723, per Desjardins J.A.

4.7. VICTIMS OF CRIMINALITY AND NEXUS TO GROUNDS

In *Noori*,[50], the Court noted that whether the claimant's fear was one of revenge from another family or a fear of persecution with political overtones is a question of fact for the panel to determine.

In a number of cases, the Trial Division has held that victims of crime, corruption[51] or vendettas[52] generally cannot establish a link between their fear of persecution and one of the five grounds in the definition. However, these cases must be read with caution in light of the Federal Court of Appeal decision in *Klinko*,[53] where the Court answered in the affirmative the following certified question:

> Does the making of a public complaint about widespread corrupt conduct by customs and police officials to a regional governing authority, and thereafter, the complainant suffering persecution on this account, when the corrupt conduct is not officially sanctioned, condoned or supported by the state, constitute an expression of political opinion as that term is understood in the definition of Convention refugee in subsection 2(1) of the Immigration Act?

An opinion expressed in opposition to a criminal organization will not provide a nexus on the basis of political opinion unless the disagreement is rooted in political conviction.[54] Similarly, opposition to corruption or criminality is not a perceived political opinion unless it can be seen to challenge the state apparatus.[55]

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[50] *Noori, Ramin v. M.C.I.* (F.C.T.D., IMM-3581-96), Rothstein, July 3, 1997.

[51] *Leon, Johnny Edgar Orellana* v. M.C.I. (F.C.T.D., no. IMM-3520-94), Jerome, September 19, 1995; *Calero, supra*, footnote 26, where the Court held that victims of organized crime do not constitute a social group; *Cutuli, Raul Horacio v. M.E.I.* (F.C.T.D., no. IMM-36-93), Wetston, May 25, 1994; *Vargas, Maria Cecilia Giraldo v. M.E.I.* (F.C.T.D., no. T-1301-92), Wetston, May 25, 1994; *Gomez, José Luis Torres* v. *M.C.I.* (F.C.T.D., no. IMM-1826-98), Pinard, April 29, 1999; and *Serrano, supra*, footnote 26.

[52] *Rivero, Omar Ramon v. M.C.I.* (F.C.T.D., no. IMM-511-96), Pinard, November 22, 1996, where the CRDD was upheld in its finding of no nexus where the claimant was the target of a personal vendetta by a government official. See also *Marincas, Dan v. M.E.I.* (F.C.T.D., no. IMM-5737-93), Tremblay-Lamer, August 23, 1994; *De Arce, Rita Gatica v. M.C.I.* (F.C.T.D., no. IMM-5237-94), Jerome, November 3, 1995. Reported: *De Arce v. Canada (Minister of Citizenship and Immigration)* (1995), 32 Imm. L.R. (2d) 74 (F.C.T.D.); *Xheko, Aida Siri* v. *M.C.I.* (F.C.T.D., no. IMM-4281-97), Gibson, August 28, 1998; and *Lara, Benjamin Zuniga* v. *M.C.I.* (F.C.T.D., no. IMM-438-98), Evans, February 26, 1999.

[53] *Klinko* (F.C.A.), supra, footnote 26.

[54] In *Ward, supra*, footnote 1, at 750, the Court stated that not just any dissent to any organization will unlock the gates of asylum; the disagreement has to be rooted in political conviction. In *Suarez, Jairo Arango v. M.C.I.* (F.C.T.D., no. IMM-3246-95), Reed, July 29, 1996, the Court found there was no political content or motivation when the claimant informed on drug lords. A similar conclusion was reached in *Munoz, Tarquino Oswaldo Padron v. M.C.I.* (F.C.T.D., no. IMM-1884-95), McKeown, February 22, 1996. See also discussion of *Marvin, supra*, footnote 17, and *Femenia, supra*, footnote 42.

[55] See *Klinko* (F.C.A.), supra, footnote 26 and note that earlier cases need to be read with caution in light of this judgment. In *Berrueta, supra*, footnote 42, the claimant had denounced kingpins of a drug cartel and the CRDD had found this not to be an expression of political opinion. However, the Court found that, in some cases, to denounce corruption is to undermine a government's authority where the corruption is pervasive throughout the

A claimant's exposure of corruption or opposition to crime will not generally place him or her in a particular social group.[56] However, in some cases, the grounds of political opinion or particular social group can provide a nexus where the claimant fears persecution as a result of criminal activity.[57]

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state. Also in *Diamanama, Nsimba v. M.C.I.* (F.C.T.D., no. IMM-1808-95), Reed, January 30, 1996, the claimant's refusal to produce dresses for a corrupt government official was viewed as a challenge to the government's authority; and in *Bohorquez, supra*, footnote 49, the claimant opposed the state lottery and faced threats by corrupt officials. The Court found that the claimant's opposition to the lottery challenged vested political interests. See also *Vassiliev, Anatoli Fedorov v. M.C.I.* (F.C.T.D. IMM-3443-96), Muldoon, July 4, 1997, where the Court found that the claimant's refusal to transfer bribes to Russian government officials and to launder money was an expression of political opinion.

In *Mousavi-Samani, Nasrin v. M.C.I.* (F.C.T.D., IMM-4674-96), Heald, September 30, 1997, the court upheld the CRDD's determination that any possible retaliation the claimant feared after making public a document detailing particulars of fraud committed at the bank where she worked and resulting in the conviction of most of the perpetrators, did not have a nexus to the definition. Exposing the fraud did not amount to a challenge to the regime's authority to govern.

See also *Mehrabani, Paryoosh Solhjou* v. *M.C.I.* (F.C.T.D., no. IMM-1798-97), Rothstein, April 3, 1998, where the Court upheld the CRDD finding that the claimant's fear of highly placed embezzlers whom he had exposed and against whom he had testified in court did not ground the claim in political opinion. Denouncing corruption was not seen as a challenge to government activities, as the state (Iran), had taken strong action against some of the corrupt officials; *Valderrama, Liz Garcia* v. *M.C.I.* (F.C.T.D., no. IMM-444-98), Reed, August 5, 1998; and *Murillo Garcia, Orlando Danilo* v. *M.C.I.* (F.C.T.D., no. IMM-1792-98), Tremblay-Lamer, March 4, 1999.

[56] In *Ward, supra*, footnote 1, at 745, the Court found that the claimant was not part of a social group since he was the target of highly individualized persecution due to what he did as an individual and not because of any group characteristics or association. This reasoning has been followed in *Suarez, supra*, footnote 54, and in *Munoz, supra*, footnote 54. In *Munoz*, the Court also found that exposing corruption is a laudable goal but not fundamental to the human dignity of the claimant and therefore does not place the claimant in a particular social group. See also *Mason, supra*, footnote 17; and *Soberanis, supra,* footnote 31.

In *Valderrama, supra,* footnote 55, counsel defined the claimant's social group as "successful businessman opposed to corruption and unwilling to pay bribes". The facts revealed that it is "successful businessmen" who are being targeted, regardless of their opposition to corruption. After considering *Ward* and *Chan* the Court held that there was no nexus between the targeted class and a Convention social group. See also *Rangel Becerra, Yanira Esthel* v. *M.C.I.* (F.C.T.D., no. IMM-3550-97), Pinard, August 24, 1998.

[57] *Klinko* (F.C.A.), supra, footnote 26. In *Cen, supra*, footnote 34, the claimant was sexually exploited by corrupt government officials. The Court found she belonged to a particular social group of women subject to exploitation and violation of security of the person. In *Reynoso, supra*, footnote 39, the claimant was the target of a corrupt mayor because she had uncovered his illegal activities. The Court held that her knowledge of the mayor's corruption was an unchangeable characteristic that placed her in a category one social group. See also *Diamanama, supra*, footnote 55, *Berrueta, supra*, footnote 42; and *Bohorquez, supra*, footnote 49.

CHAPTER 4

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CHAPTER 5

5. WELL-FOUNDED FEAR

5.1. GENERALLY

The definition of Convention refugee is forward-looking. It follows, therefore, that the fear of persecution is to be assessed at the time of the examination of the claim to refugee status.[1]

The claimant must establish that the fear is reasonable,[2] i.e. is justified considering the objective situation. In other words, the claimant must establish that his or her fear of persecution has a valid basis.[3]

Most importantly, the claimant does not have to establish that he or she was persecuted in the past or that he or she would or will be persecuted in the future.[4] Although evidence relating to a past fear of persecution can properly be the foundation of a present fear,[5] there is no requirement to show past persecution to substantiate a claim for refugee status.

The mere existence of an oppressive law which is enforced only sporadically does not by itself show that all members of the group targeted by the law have good grounds for fearing persecution.[6]

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1 *Longia v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 288 (C.A.); *Mileva v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 398 (C.A.); *M.E.I. v. Paszkowska, Malgorzata* (F.C.A., no. A-724-90), Hugessen, MacGuigan, Décary, April 16, 1991. Reported: *Canada (Minister of Employment and Immigration) v. Paszkowska* (1991), 13 Imm. L.R. (2d) 262 (F.C.A.).

2 *Naredo, Fernando Arduengo v. M.E.I.* (F.C.T.D., no. T-1985-89), Muldoon, July 24, 1990. Reported: *Naredo v. Canada (Minister of Employment and Immigration)* (1990), 11 Imm. L.R. (2d) 92 (F.C.T.D.).

3 *Lai, Kai Ming v. M.E.I.* (F.C.A., no. A-792-88), Marceau, Stone, Desjardins, September 18, 1989. Reported: *Lai v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 245 (F.C.A.).

4 *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 (C.A.), at 258. See also *Iazlovitskaia, Alla v. M.E.I.* (F.C.T.D., no. A-70-93), Gibson, November 25, 1993, at 3. In *Mokabila, Guy Lessendjina v. M.C.I.* (F.C.T.D., no. IMM-2660-98), Denault, June 2, 1999, the Court held that to require a claimant to prove that he would himself be persecuted in the future constituted an error of law. However, where section 2(3) of the *Immigration Act* may apply, it is necessary for the CRDD to determine whether the claimant was persecuted in the past: *Iossifov, Svetoslav Gueorguiev v. M.E.I.* (F.C.T.D., no. A-854-92), McKeown, December 8, 1993, at 2. See also Chapter 7, section 7.2.

5 *Oyarzo v. Canada (Minister of Employment and Immigration)*, [1982] 2 F.C. 779 (C.A.). See also *Retnem, Rajkumar v. M.E.I.* (F.C.A., no. A-470-89), MacGuigan, Décary, Pratte (dissenting), May 6, 1991. Reported: *Retnem v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 317 (F.C.A.).

6 *Butt, Abdul Majid (Majeed) v. S.G.C.* (F.C.T.D., no. IMM-1224-93), Rouleau, September 8, 1993.

The state's inability to protect must be considered at the stage of the analysis when one is examining whether the claimant's fear is well founded.[7]

5.2. TEST - STANDARD OF PROOF

The claimant must establish, on a balance of probabilities, that there are "good grounds" for fearing persecution.[8] This may also be called a "reasonable" or even a "serious possibility", as opposed to a mere possibility.[9]

The test for well-foundedness was further clarified in *Ponniah*,[10] where Desjardins J.A. stated:

> "Good grounds" or "reasonable chance" is defined in *Adjei* as occupying the field between upper and lower limits; it is less than a 50 per cent chance (i.e., a probability), but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is "good grounds".

The Federal Court has held that certain phrasing in CRDD reasons, such as "we are not convinced" or "the claimant did not convince us", implied overly exacting standards of proof.[11]

5.3. SUBJECTIVE FEAR AND OBJECTIVE BASIS

The subjective fear relates to the existence of a fear of persecution in the mind of the claimant. The objective basis requires that there be a valid basis for this fear.[12] A claimant may

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7 *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85, at 712 and 722. For a fuller discussion of state protection, see Chapter 6.

8 *Seifu, Eshetu v. M.E.I.* (F.C.A., no. A-277-82), Pratte, Le Dain, Hyde, January 12, 1983.

9 *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.), at 683. See also *M.E.I. v. Satiacum, Robert* (F.C.A., no. A-554-87), Urie, Mahoney, MacGuigan, June 16, 1989. Reported: *Canada (Minister of Employment and Immigration) v. Satiacum* (1989), 99 N.R. 171 (F.C.A.).

10 *Ponniah, Manoharan v. M.E.I.* (F.C.A., no. A-345-89), Heald, Hugessen, Desjardins, May 16, 1991. Reported: *Ponniah v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 241 (F.C.A.), at 245. See also *Ioda, Routa v. M.E.I.* (F.C.T.D., no. 92-A-6604), Dubé, June 18, 1993. Reported: *Ioda v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 294 (F.C.T.D.), where the court held that the Refugee Division used an improper statement of the test in *Adjei, supra*, footnote 9, when it determined that there was only a "mere risk" that the claimant might be a victim of persecution.

11 *Chichmanov, Yordan Anguelov v. M.E.I.* (F.C.A., no. A-243-91), Isaac, Heald, Létourneau, September 3, 1992, at 2; *Yeboah, Christian v. M.E.I.* (F.C.T.D., no. 92-A-7049), Teitelbaum, July 16, 1993. Reported: *Yeboah v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 81 (F.C.T.D.), at 91; *Petrescu, Mihai v. S.G.C.* (F.C.T.D., no. A-980-92), Tremblay-Lamer, October 26, 1993, at 5. See also *Cortez, Luis Reinaldo Cepeda v. M.E.I.* (F.C.T.D., no. A-39-93), Noël, September 3, 1993, at 2; and *Flores, Flor de Maria (Flor Maria) Herrera v. M.E.I.* (F.C.T.D., no. IMM-2591-93), Gibson, April 22, 1994. See however *Mvudi, Ndondi v. M.C.I.* (F.C.T.D., no. IMM-3168-98), Teitelbaum, May 5, 1999, where the Court stated that in saying that it was "unlikely" the claimant would be a target for persecution, the panel in fact found there was no serious possibility of persecution, and did not use an excessive burden of proof.

have a subjective fear that he or she will be persecuted if returned to his or her country, but the fear must be assessed objectively in light of the situation in the country of which the claimant is a national to determine whether it is well founded.[13]

The testimony of a trustworthy third party may make it possible to establish the objective aspect of the claimant's fear; in other words, this third party can establish the objective probability of the fear alleged by the claimant.[14]

The converse situation, that is, rejecting a claim because of the absence of subjective fear in the presence of an objective basis for the fear, was found to be "doubtful" in *Yusuf*[15] where Hugessen J.A. stated:

> I find it hard to see in what circumstances it could be said that a person who, we must not forget, is by definition claiming refugee status could be right in fearing persecution and still be rejected because it is said that fear does not actually exist in his conscience.

In *Seevaratnam*,[16] the Court stated that where a claimant is found not credible (as opposed to a case where there is a total absence of credible and trustworthy evidence), the Board must still objectively assess the rest of the evidence and determine if the claimant has a well-founded fear of persecution.

A claimant's mental condition should not normally be used to argue that he or she cannot establish a subjective fear.[17]

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[12] *Rajudeen, Zahirdeen v. M.E.I.* (F.C.A., no. A-1779-83), Heald, Hugessen, Stone (concurring), July 4, 1984. Reported: *Rajudeen v. Canada* (Minister of Employment and Immigration) (1984), 55 N.R. 129 (F.C.A.), at 134. See also Adjei, supra, footnote 9; *Amaniampong, Kofi v. M.E.I.* (F.C.A., no. A-1326-87), Heald (dissenting), Mahoney, Hugessen, May 19, 1989; *Kassa, Daniel Mikael v. M.E.I.* (F.C.A., no. A-852-88), Heald, Mahoney, Desjardins, September 6, 1989. Reported: *Kassa v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 1 (F.C.A.); and *Ward*, supra, footnote 7. *Rajudeen* was followed in *Parmar, Satnam Singh v. M.C.I.* (F.C.T.D., no. IMM-838-97), Joyal, January 21, 1998; *Lin, Mei Qin* v. *M.C.I.* (F.C.T.D., no. IMM-1156-97), Joyal, February 26, 1998; *Chudinov, Nickolai v. M.C.I.* (F.C.T.D. no. IMM-2419-97), Joyal, August 14, 1998; and *Maximilok, Yuri v. M.C.I.* (F.C.T.D., no. IMM-1861-97), Joyal, August 14, 1998, in which case the Court stated that the subjective basis for a fear of persecution depended solely on the claimants' credibility.

[13] *Kwiatkowsky v. Canada (Minister of Employment and Immigration)*, [1982] 2 S.C.R. 856, at 862. See also *Tung, Zhang Shu v. M.E.I.* (F.C.A., no. A-220-90), Heald, Stone, Linden, March 21, 1991. Reported: *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.).

[14] *Amaniampong, supra*, footnote 12, at 2-3.

[15] *Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629 (C.A.), at 632. See also *Shanmugarajah, Appiah v. M.E.I.* (F.C.A., no. A-609-91), Stone, MacGuigan, Henry, June 22, 1992. *Yusuf* was followed in *Dirie, Abdulle Milgo v. M.C.I.* (F.C.T.D., no. IMM-5428-97), Cullen, October 6, 1998.

[16] *Seevaratnam, Sukunamari v. M.C.I.* (F.C.T.D., no. IMM-3728-98), Tremblay-Lamer, May 11, 1999, which refers to *Katalayi, Tshibola v. M.C.I.* (F.C.T.D., no. IMM-179-97), Wetston, October 31, 1997.

[17] *Rosales, Carlos Guillermo Cabrera v. M.E.I.* (F.C.T.D., no. A-750-92), Rothstein, November 26, 1993. Reported: *Rosales v. Canada (Minister of Employment and Immigration)* (1993), 23 Imm. L.R. (2d) 100 (F.C.T.D.), at 105.

In the *Amaniampong*[18] decision, however, the Court of Appeal refused to tamper with the CRDD's decision which found credible objective evidence but found the claimant not credible with respect to the "subjective branch of the test".

In *Parada*,[19] the Court found that if a claimant testifies that he fears for his life and there is evidence to reasonably support those fears, it is improper for the Refugee Division to reject that testimony out of hand without making a negative finding of credibility. In *Shapari*,[20] the Court suggested, in *obiter*, that

> Applicants should also remember that actions they themselves take which are intended to result in their not being able to return to a country which has already granted them Convention refugee status may well evidence an absence of the subjective fear of persecution in their original country from which they purport to be seeking refuge.

5.4. DELAY

Delay in making a claim to refugee status is not in itself a decisive factor. However, it is a relevant, and potentially important, consideration,[21] for example, where the claimant delayed in making a claim upon arrival in Canada,[22] or did not seek protection in countries where the

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[18] *Amaniampong, supra*, footnote 12, at 2. See also *Liu, Ying Yang v. M.C.I.* (F.C.T.D., no. IMM-4316-94), Reed, May 16, 1995, where the Court found, at 3, that it was not appropriate "to quash the CRDD's decision in the light of [its] findings concerning the lack of evidence of subjective fear on the part of the female [claimant]."

[19] *Parada, Felix Balmore v. M.C.I.* (F.C.T.D., no. A-938-92), Cullen, March 6, 1995, at 5.

[20] *Shapari, Khadijeh* v. *M.C.I.* (F.C.T.D., no. IMM-2327-97), Rothstein, April 3, 1998

[21] *Heer, Karnail Singh v. M.E.I.* (F.C.A., no. A-474-87), Heald, Marceau, Lacombe, April 13, 1988; *Huerta, Martha Laura Sanchez v. M.E.I.* (F.C.A., no. A-448-91), Hugessen, Desjardins, Létourneau, March 17, 1993. Reported: *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.), at 226-227. *Heer* was followed in *Yang, Sui* v. *M.C.I.* (F.C.T.D., no. IMM-673-96), Heald, November 21, 1996.

[22] *Hurt v. Canada (Minister of Manpower and Immigration)*, [1978] 2 F.C. 340 (C.A.), at 342; *Huerta, supra*, footnote 21; *Hanna, Nwora Kiriakos v. M.E.I.* (F.C.T.D., no. IMM-220-93), Cullen, February 3, 1994; *Marquez, Ricardo v. M.E.I.* (F.C.T.D., no. IMM-3166-93), Simpson, June 1, 1994; *Lameen, Ibrahim v. S.S.C.* (F.C.T.D., no. A-1626-92), Cullen, June 7, 1994. See also *Thomas, Arthurine Deniz v. M.C.I.* (F.C.T.D., no. IMM-4899-96), McGillis, February 19, 1998 ("the Board was entitled to consider in its assessment the applicant's lengthy delay in making her claim to refugee status."); *Araya, Carolina Isabel Valenzuela v. M.C.I.* (F.C.T.D., no. IMM-3948-97), Gibson, September 4, 1998 (the claimants delayed making claims for five months), and *Leon, Hoimer Duban Sierra v. M.C.I.* (F.C.T.D., no. IMM-3650-97), Muldoon, October 23, 1998 (claimant delayed making his claim to refugee status for over five years because, he said, he feared deportation by the authorities since he was an illegal. The Cuurt said: "It is incredible that he would believe that he could not make a refugee claim because he was an illegal, that he didn't have a Visa, or whatever. That is incredible. That he would wait five years in that belief, if the belief were true, is even more incredible.").

claimant resided or sojourned or through which the claimant travelled[23] that are signatories to the Convention.[24] Delay in leaving the country of persecution may also be a relevant consideration.[25]

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[23] *Saez, Maritza Elizabeth Lagos v. M.E.I.* (F.C.T.D., no. 92-A-6908), Dubé, June 23, 1993, at 2 (transit country and country where claimant sojourned); *Mekideche, Anouar* v. *M.C.I.* (F.C.T.D., no. IMM-2269-96), Wetston, December 9, 1996 (transit country); *Thandi, Ajaib Singh v. S.S.C.* (F.C.T.D., no. IMM-4547-93), Nadon, May 27, 1994; *Bogus, Mehmet v. M.E.I.* (F.C.T.D., no. T-153-93), Rothstein, November 26, 1993, at 3 (country of residence); *Lameen, supra*, footnote 22; *Ilie, Lucian Ioan v. M.C.I.* (F.C.T.D., no. IMM-462-94), MacKay, November 22, 1994 (transit countries); *Wey, Edward Kolawole v. S.S.C.* (F.C.T.D., no. IMM-2758-94), Gibson, February 21, 1995 (countries of residence); *Memarpour, Mahdi* v. *M.C.I.* (F.C.T.D., no. IMM-3113-94), Simpson, May 25, 1995; and *Hankali, Levent* v. *M.C.I.* (F.C.T.D., no. IMM-2575-94), MacKay, March 14, 1996. But note those cases where the Court found that the claimant had provided plausible and uncontradicted explanations for not seeking to remain or claim refugee status in various countries en route to Canada, e.g. *Owusu-Ansah, Charles Kofi v. M.E.I.* (F.C.A., no. A-1265-87), Heald, Mahoney, Hugessen, May 19, 1989. Reported: *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 106 (F.C.A.), where the Ghanaian claimant provided reasons why he could not have safely stayed in neighbouring Togo or Nigeria; *Tung, supra*, footnote 13, where the Chinese claimant, who was at all times in transit, provided reasons for selecting Canada as a safe haven over other countries he had considered with the assistance of his agent; and *Ahani, Roozbeh* v. *M.C.I.* (F.C.T.D., no. IMM-4985-93), MacKay, January 4, 1995, where the claimant was in transit only for 9 days.

See also *Safakhoo, Masoud v. M.C.I.* (F.C.T.D., no. IMM-455-96), Pinard, April 11, 1997, where an Iranian claimant had resided 5 years in France without asking for protection; and *Bello, Salihou v. M.C.I.* (F.C.T.D., no. IMM-1771-96), Pinard, April 11, 1997, where in the case of a claimant who had returned to Cameroun on two occasions and had failed to claim refugee status in the 7½ years preceding his claim in Canada, the Court found it was not unreasonable for the CRDD to find that the claimant's actions were not consistent with those of a person with a subjective fear of persecution, and to make the further finding that the claimant's evidence was not credible; *Madoui, Nidhal Abderrah* v. *M.C.I.* (F.C.T.D., no. IMM-660-96), Denault, October 25, 1996, where the panel found a lack of subjective fear of persecution because the claimant had never claimed refugee status while he had been in Italy for 19 months and in the United States for 20 days.

See also *Nguyen, Mai Huong v. M.C.I.* (F.C.T.D., no. IMM-2196-97), Rothstein, April 2, 1998, where the Court found the panel made no error in finding that the claimant had no subjective fear of persecution in Vietnam, having regard to her long delay in making a refugee claim, because she had left Vietnam in 1989 for the Soviet Union, stayed there until 1995, went to several countries and eventually came to Canada in April of 1995. And see *Sokolov, Georgy Viktorov v. M.C.I.* (F.C.T.D., no. IMM-3853-97), Blais, September 16, 1998, where the CRDD was able to take into account the fact that the claimants had lived in the Czech Republic without claiming refugee status there; and *Guzman, Jesus Ruby Hernandez v. M.C.I.* (F.C.T.D., no. IMM-3748-97), Rothstein, October 29, 1998, where the panel found, primarily based on the long delay in making claims (claimants had made no refugee claims over a three year period in Guatemala, Mexico, or the United States), that the claimants lacked a subjective fear. And in *Skretyuk, Stefan et al.* v. *M.C.I.* (F.C.T.D. no. IMM-3240-97), Dubé, June 4, 1998, the Court indicated that it was correct of the panel to have taken into account the behaviour of the applicants in failing to claim refugee status in two countries before arriving in Canada ("a claimant travelling through a country that is a signatory to the Convention must claim refugee status as soon as possible, or the claim may not be considered serious.").

[24] In *Ilie, supra*, footnote 23, at 3, the Court stated that the CRDD is entitled to take notice of the status of countries that are signatories to the Convention and may also assume that such countries will meet their obligation to implement the Convention within their own territory, unless evidence to the contrary is adduced. But see *Tung, supra*, footnote 13, at 394.

[25] *Huerta, supra*, footnote 21, (claimant continued to work and attend classes); *Radulescu, Petrisor v. M.E.I.* (F.C.T.D., no. 92-A-7164), McKeown, June 16, 1993 (2-year delay in leaving Romania after police beatings and telephone threats); *Rosales, supra*, footnote 17, (9-month delay in leaving despite the disappearance of a political colleague); *De Beltran, Delia Mayen v. S.S.C.* (F.C.T.D., no. IMM-3851-93), MacKay, September 6, 1994. Reported: *De Beltran v. Canada (Secretary of State)* (1994), 28 Imm. L.R. (2d) 157 (F.C.T.D.) (5-

Delay points to a lack of subjective fear of persecution, the reasoning being that someone who was truly fearful would claim refugee status at the first opportunity.[26]

In *Huerta*, Mr. Justice Létourneau wrote:

> The delay in making a claim to refugee status is not a decisive factor in itself. It is, however, a relevant element which the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant.[27]

The circumstances causing delay must be examined in each case in order to determine whether or not the delay can be said to be indicative of a lack of subjective fear.[28]

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month delay in leaving El Salvador after receiving a threat); *Hristov, Hristo v. M.E.I.* (F.C.T.D., no. IMM-2090-94), Cullen, January 5, 1995. Reported: *Hristov v. Canada (Minister of Employment and Immigration)* (1994), 23 Imm. L.R. (2d) 278 (F.C.T.D.). (delay in leaving Bulgaria in face of physical attacks, home break-ins and fire-bombing of car). But see *Ezi-Ashi, Jame Chike* v. *S.S.C* (F.C.T.D., no. IMM-1257-93), Wetston, February 28, 1994 and *Zuniga, Alexis Ramon Garcia* v. *S.C.C.*, (F.C.T.D., no. IMM-118-94), Teitelbaum, July 4, 1994. In *Ali, Salah Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2402-95), Tremblay-Lamer, April 25, 1996, the Court upheld the negative decision of the CRDD, which had found that the principal claimant's delay in making a claim in the U.S.A. (where he had spent close to three years) was inconsistent with a person claiming to fear persectution. See also *Singh, Sebastian Swatandra v. M.C.I.* (F.C.T.D., no. IMM-3840-97), Nadon, December 7, 1998 where the Court upheld the negative finding of the CRDD based on the view that the male claimant had not made a serious attempt to leave Fiji between 1987 and 1995, which undermined his subjective fear of persecution; and *Parmar*, *supra*, footnote 12, where the Court upheld the negative CRDD finding based on the claimant's delayed departure from India.

[26] *Castillejos, Jaoquin Torres v. M.C.I.* (F.C.T.D., no. IMM-1950-94), Cullen, December 20, 1994, where the Court stated, at 4, that delay points to a lack of subjective fear and does not relate to the objective basis of the claim.

[27] *Huerta*, *supra*, footnote 21, at 227.

[28] *Hue, Marcel Simon Chang Tak v. M.E.I.* (F.C.A., no. A-196-87), Marceau, Teitelbaum, Walsh, March 8, 1988, at 2 (as long as claimant was a sailor on a ship he did not need to seek protection); *Tung*, *supra*, footnote 13, at 394 (claimant was at all times in transit); *Jbel, Bouazza v. M.E.I.* (F.C.T.D., no. A-1058-92), Gibson, September 10, 1993, at 5; *Abou El Joud, Mohamad Ali v. M.E.I.* (F.C.A., no. A-21-93), Nadon, January 19, 1994; *Ezi-Ashi*, *supra* footnote 25, (Court overturned CRDD's finding based on delay); *Ahani*, *supra*, footnote 23, at 4 (where the CRDD's conclusion that the claimant lacked a subjective fear for not having made a claim during the nine days he travelled to Canada was found to be unreasonable); *Williams, Debby v. S.S.C.* (F.C.T.D., no. IMM-4244-94), Reed, June 30, 1995 (claimant did not know she was entitled to claim refugee status on the ground of spousal abuse), followed in *Elcock (Milkson), Joan Theresa v. M.C.I.* (F.C.T.D., no. IMM-2985-98), Gibson, September 20, 1999, where the claimant and her children had every reasons to keep a low profile and did not wish to expose themselves to immigration authorities if it was unnecessary to do so. When their situation became known to police and immigration authorities, there was no delay in claiming.

In a number of cases adverse inferences were drawn from the claimant's failure to go into hiding immediately after learning that he or she may be in danger: *Tao, Zhen v. M.E.I.* (F.C.T.D., no. 92-A-7039), Noël, June 22, 1993. See, however, *Wong, Siu Ying v. M.E.I.* (F.C.A., no. A-804-90), Heald, Marceau, Linden, April 8, 1992. Reported: *Wong v. Canada (Minister of Employment and Immigration)* (1992), 141 N.R. 236 (F.C.A.); *Giron, Luis Fernando Soto y v. M.E.I.* (F.C.A., no. A-387-89), Mahoney, MacGuigan, Linden, May 28, 1992. Reported: *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.); *Sabaratnam, Thavakaran v. M.E.I.* (F.C.A., no. A-536-90), Mahoney, Stone, Robertson, October 2, 1992 (a person "successfully in hiding from his persecutor can scarcely be said to be experiencing no problems"); *Tung*, *supra*, footnote 13, at 393.

In *Diluna*,[29] the Trial Division held, *in obiter*, that the Refugee Division should have considered a psychiatric assessment that supported the claimant's assertion that she delayed seeking refugee status due to post-traumatic stress syndrome.

In *Gabeyehu*,[30] the Court noted that "[d]elay in making a claim can only be relevant from the date as of which [a claimant] begins to fear persecution."

In *Beltran*,[31] the Court found that the claimant had given a good explanation for delaying making a claim, and stated that the Board should have given reasons as to why it did not accept the explanation as valid. In *Mejia*,[32] the Board had found that the claimant had not left until some months after the issuance of her passport, and apparently inferred that she had not displayed appropriate panic. But the Court found that it failed to squarely address whether it doubted her subjective fear, and failed to mention she had been in hiding.

In *El-Naem*,[33] the Court found that it was unreasonable for the 19-year-old Syrian claimant to seek for protection in Greece (where he had spent one year), given "all the circumstances":

> It is too heavy a burden to place on a young person, impecunious and on his own, in a strange land with strange customs and language, and without family support, to assume he would inevitably act in a manner that reasonable persons, secure in Canada, might regard as the only rational manner.

In *Yoganathan*[34] the Court held that the CRDD erred in concluding that the claimant, a seaman, did not have a subjective fear of persecution as he had failed to claim refugee status at the first opportunity in other signatory countries: "The [claimant] had his 'sailor's papers' and 'a ship to sail on'. In the circumstances, he did not have to seek protection." In *Liblizadeh*[35], the Court quashed the decision of the CRDD when it found that there was no evidence before the panel that the claimant might have realistically applied for refugee status in Turkey, even though he was there 7 months, and in the US, where he was only in transit. With respect to claiming status in Canada, the claimant met with immigration authorities two days after arriving and was given an appointment for three weeks later, at which time he filed his claim. And in

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[29] *Diluna, Roselene Edyr Soares v. M.E.I.* (F.C.T.D., no. IMM-3201-94), Gibson, March 14, 1995. Reported: *Diluna v. Canada (Minister of Employment and Immigration)* (1995), 29 Imm. L.R. (2d) 156 (F.C.T.D.), at 162.

[30] *Gabeyehu, Bruck v. M.C.I.* (F.C.T.D., no. IMM-863-95), Reed, November 8, 1995, at 3.

[31] *Beltran, Luis Fernando Berrio v. M.C.I.* (F.C.T.D., no IMM-829-96), Dubé, October 29, 1996.

[32] *Mejia, Maria Esperanza Martinez v. M.C.I.* (F.C.T.D., no. IMM-1040-95), Simpson, February 2, 1996 (reasons signed July 29, 1996)

[33] *El-Naem, Faisal* v. *M.C.I.*, (F.C.T.D. IMM-1723-96), Gibson, February 17, 1997. Reported: *El-Naem v. Canada (Minister of Citizenship and Immigration)* (1997), 37 Imm. L.R. (2d) 304 (F.C.T.D.)

[34] *Yoganathan, Kandasamy* v. *M.C.I.* (F.C.T.D., no. IMM-3588-97), Gibson, April 20, 1998.

[35] *Liblizadeh, Hassan* v. *M.C.I.* (F.C.T.D., no. IMM-5062-97), MacKay, July 8, 1998.

Farahmandpour,[36] the Court held that the CRDD erred when it rejected the claim of a 78-year-old woman of the Baha'i faith, (whose two sons had successfully claimed refugee status at the Canadian embassy in Pakistan), on the basis of delay in leaving Iran and in claiming in Canada, as well as her failure to claim in Australia and the US. The CRDD erred in not considering the tragic situation she found herself in after the death of her husband and that the delays were explained by illness.

In *Papsouev*,[37] the Court found that the Refugee Division unreasonably disregarded the claimants' explanations that they had incurred delays in obtaining passports and visas for their daughters. More importantly, in that case, the Court found that the panel had no grounds to reject, on the issue of delay, the evidence of a reputable lawyer and an officer of the Court. And in *Dcruze*,[38] the Court held that a delay of two years and six months between the claimant's departure and his application was "not extreme", and that his delay should not have been determinative of the matter; the Board should have examined the claim on its merits.

In Voyvodov,[39] the Refugee Division had found that a claimant had failed to meet his burden because he had testified about only one incident, and then went on to express its concern about his delay in leaving the country. The Court said:

> It is not reasonable to conclude that one applicant failed to establish his case on the basis of only one incident and to question the other applicant's decision to remain in Bulgaria after having been physically abused for the first time in 1994. The tribunal appears to place the applicants in an impossible position. It implies that it does not believe Mr. Galev's claim of persecution because he only experienced one alleged attack due to his sexual orientation. On the other hand, it finds that Mr. Voyvodov is not credible because he delayed seeking international protection after being initially attacked. This contradictory finding also requires the Court's intervention.[40]

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[36] *Farahmandpour, Tahereh* v. *M.C.I.* (F.C.T.D., no. IMM-92-97), Dubé, December 15, 1998.

[37] *Papsouev, Vitali v. M.C.I.* (F.C.T.D., no. IMM-4619-97), Rouleau, May 19, 1999.

[38] *Dcruze, Jacob Ranjit v. M.C.I.* (F.C.T.D., no. IMM-2910-98), Rouleau, June 17, 1999.

[39] *Voyvodov, Bogdan Atanassov v. M.C.I.* (F.C.T.D., no. IMM-5601-98), Lutfy, September 13, 1999.

[40] *Ibid.*, paragraph 10.

5.5. RE-AVAILMENT OF PROTECTION

Return to the country of nationality may indicate that a well-founded fear of persecution is lacking where the claimant's conduct is inconsistent with such fear.[41] Obtaining or renewing a passport or travel document,[42] and leaving or emigrating through lawful channels may also indicate that a well-founded fear of persecution is lacking.[43]

It is proper for the Refugee Division, when considering the subjective element, to look at the fact that the claimant took allegedly self-endangering actions after making his or her claim, and to inquire into the claimant's motivation.[44] But if the claimant gives reasons why he or she returned to his or her country, clearly states that he or she did not re-avail of the protection of that country and asserts not to have lost his or her subjective fear, absent an adverse finding of credibility, the Board would err in finding, on the basis of the purely circumstantial evidence of such returns, that the claimant had re-availed him or herself of protection and did not have a subjective fear.[45]

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[41] *Caballero, Fausto Ramon Reyes v. M.E.I.* (F.C.A., no. A-266-91), Marceau (dissenting), Desjardins, Létourneau, May 13, 1993; *Larue, Jacqueline Anne v. M.E.I.* (F.C.T.D., no. 92-A-6666), Noël, May 13, 1993 (part of CRDD's plausibility assessment); *Abou El Joud, supra*, footnote 28; *Bogus, supra*, footnote 23; *Zergani, Ahmad Jassemi v. M.E.I.* (F.C.A., no. A-311-92), Heald, Stone, McDonald, April 12, 1994; *Galdamez, Santo Peraza v. M.E.I.* (F.C.T.D., no. IMM-1544-94), McKeown, December 9, 1994 (claimant returned to home country after making refugee claim in Canada); *Hoballah, Hassane v. M.E.I.* (F.C.T.D., no. IMM-3670-93), Joyal, January 10, 1995 (claimant returned a number of times to country of nationality); *Tejani, Abdulkarim* v. *M.E.I.* (F.C.T.D., no. 92-T- 1306), Reed, June 2, 1993; *Bogus, supra*, footnote 23; *Al-Kahtani, Naser Shafi Mohammad* v. *M.C.I.* (F.C.T.D., no. IMM-2879-94), MacKay, March 13, 1996. In *Ali, supra*, footnote 25, the Court found that the CRDD's conclusion that the claimants would not have returned to Sudan if they had a well-founded fear of persecution, was an inference that was reasonably open to the CRDD. But see *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.) at 304; and *Parada, supra*, footnote 19, (CRDD made no adverse credibility finding). See also *Araya, supra*, footnote.22. The principal claimant had returned to Chile and remained there for some nine weeks while she obtained the permission of the father of her child to remove the child from Chile. While the evidence regarding reavailment clearly indicated that it was for the sole purpose of allowing the mother to bring her son to Canada with her, the evidence did not go so far as to establish that other arrangements could not have been made so that the two claimants could have left Chile together when the mother first left.)

[42] In *Maldonado, supra*, footnote 41, the Court pointed out that the Immigration Appeal Board ignored the fact that the claimant was able to obtain his passport (and exit papers) through his brother's contacts with the government. In *Jbel, supra*, footnote, 28, the fact that claimant had obtained a passport before the occurrence that motivated him to leave his country, was found not to be inconsistent with his decision to leave for the reason he stated.

[43] *Orelien v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 592 (C.A.). See also *Bello, supra*, footnote 23.

[44] *Herrera, Juan Blas Perez de Corcho v. M.E.I.* (F.C.T.D., no. A-615-92), Noël, October 19, 1993, at 3; see also Chapter 7, section 7.3., *sur place* claims.

[45] *Kanji, Mumtaz Badurali* v. *M.C.I.* (F.C.T.D., no. IMM-2451-96), Campbell, April 4, 1997.

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CHAPTER 6

6. STATE PROTECTION

6.1. INTRODUCTION - GENERAL PRINCIPLES

The issue of state protection was extensively canvassed by the Supreme Court of Canada in *Ward*.[1] The context for the discussion of this topic is the requirement in the definition of Convention refugee that the claimant be unable, or by reason of his or her fear of persecution, unwilling to avail him or herself of the protection of the country of nationality (citizenship). As indicated below, the state's ability to protect the claimant is a crucial element in determining whether the fear of persecution is well founded, and as such, is not an independent element of the definition.

The Supreme Court of Canada in *Ward* set down (or confirmed) the following principles with respect to this issue.

6.1.1. Surrogate Protection

The responsibility to provide international protection only becomes engaged when national or state protection is unavailable to the claimant (international protection as a surrogate).[2]

6.1.2. Multiple Nationalities

In the case of multiple nationalities (citizenship), the claimant is normally expected to make inquiries or applications to ascertain whether or not he or she might avail him or herself of the protection of all the countries of nationality. The claimant need not literally approach the other states for protection unless there is a reasonable expectation that protection will be forthcoming.[3]

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[1] *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85.

[2] *Ward*, *ibid.*, at 709. In *Madoui, Nidhal Abderrah v. M.C.I.* (F.C.T.D. no. IMM-660-96), Denault, October 25, 1996, the claimant, who was from Algeria, had spent some time in Italy before coming to Canada. The CRDD held that the failure to claim refugee status in Italy showed a lack of subjective fear. Before the Court, the claimant relied on statistics showing that Italy rarely granted refugee status to claimants like him to argue that he had no obligation to seek the protection of a state which had shown itself unable to give it. The Court rejected the idea of a parallel based on *Ward*, between a state's failure to protect its citizens and a state's refusal to grant refugee status to certain claimants. "Before asserting that he had no chance of success either in seeking protection ... [in Algeria ...] or in claiming refugee status from the Italian authorities, it was still necessary for the [claimant] either to try do so, or as the Supreme Court stated in *Ward*, to establish the reasonableness of his failure to seek such protection." (at 2).

[3] *Ward*, *supra*, footnote 1, at 724 and 754. As well, at 754, the Court stated that a valid claim against one country of nationality will not fail if the claimant is denied protection (for example, by being denied admittance) by another country of which he or she is a national.

6.1.3. Timing of Analysis

The state's ability to protect, whether one is speaking of the claimant being "unable" or "unwilling", must be considered at the stage of the analysis when one is examining whether the claimant's fear is well founded.

> ... The test is in part objective; if a state is able to protect the claimant, then his or her fear is not, objectively speaking, well-founded ...
>
> It is clear that the lynch-pin of the analysis is the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded, and thereby the objective reasonableness of his or her unwillingness to seek the protection of his or her state of nationality.[4]

6.1.4. Unable or Unwilling - A Blurred Distinction - No Requirement for State Complicity

The distinction between "unable" (physically or literally unable) and "unwilling" (not wanting) has become blurred.[5]

> Whether the claimant is "unwilling" or "unable" to avail him- or herself of the protection of a country of nationality, state complicity in the persecution is irrelevant. The distinction between these two branches of the "Convention refugee" definition resides in the party's precluding resort to state protection: in the case of "inability", protection is denied to the claimant, whereas when

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[4] *Ward*, *supra*, footnote 1, at 712 and 722. See also *Miranda, Elmer Edgar Valencia v. M.C.I.* (F.C.T.D. no. IMM-5882-93), Muldoon, March 31, 1995, where the Court stated, at 23: "... the state's inability to protect is a crucial element in determining whether the refugee claim is objectively well-founded. ... the tribunal conducted a separate and distinct consideration of what should have been highly interwoven elements."

[5] The Supreme Court of Canada essentially adopted paragraphs 98, 99 and 100 of the UNHCR *Handbook* as being an "entirely reasonable reading of the current definition" (*Ward*, at 718). These paragraphs read as follows:

> 98. Being *unable* to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution.
>
> 99. What constitutes a refusal of protection must be determined according to the circumstances of the case. If it appears that the applicant has been denied services (e.g., refusal of a national passport or extension of its validity, or denial of admittance to the home territory) normally accorded to his co-nationals, this may constitute a refusal of protection within the definition.
>
> 100. The term *unwilling* refers to refugees who refuse to accept the protection of the Government of the country of their nationality. It is qualified by the phrase "owing to such fear". Where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country "owing to well-founded fear of persecution". Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.

> the claimant is "unwilling", he or she opts not to approach the state by reasons of his or her fear on an enumerated basis. In either case, the state's involvement, in the persecution is not a necessary consideration. This factor is relevant, rather in the determination of whether a fear of persecution exists.[6]

6.1.5. Presumptions

There are two presumptions at play in refugee determination:

Presumption 1: If the fear of persecution is credible (the Court uses the word "legitimate") and there is an absence of state protection, it is not a great leap "… to presume that persecution will be likely, and the fear well-founded."[7] (Emphasis in original)

> Having established the existence of a fear and a state's inability to assuage those fears, it is not assuming too much to say that the fear is well-founded. Of course, the persecution must be real - the presumption cannot be built on fictional events - but the well-foundedness of the fear can be established through the use of such a presumption.[8] (Emphasis in original)

Presumption 2: Except in situations where the state is in a state of complete breakdown, states must be presumed capable of protecting their citizens. This presumption can be rebutted by "clear and convincing" evidence of the state's inability to protect.[9]

> The danger that [presumption one] will operate too broadly is tempered by a requirement that clear and convincing proof of a state's inability to protect must be advanced.[10]

6.1.5.1. Inability to Protect - Nexus

In *Badran*,[11] the Court indicated that the "law does not require that the inability to protect be connected to a Convention reason." Conversely, one may argue that even though the source of the persecution is not grounded in a Convention reason, a State's failure to act (protect), if motivated by a Convention ground, can establish the nexus to the definition, i.e., the failure to protect for a Convention reason can in itself amount to persecutory treatment.

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6 *Ward, supra*, footnote 1, at 720-721.

7 *Ward, supra*, footnote 1, at 722. See also *Sandy, Theresa Charmaine v. M.C.I.* (F.C.T.D. no. IMM-22-95), Reed, June 30, 1995, where the Court stated, at 2: "The presumption that persecution will be likely and fear well founded only arises from the establishment of a claimant's subjective fear, 'if there is an absence of state protection' (see *Ward*…). That is, proof of the state's inability to protect, or a presumption relating thereto, does not arise from a finding that the [claimant] has a subjective fear. The need to prove 'state inability to protect' is an additional requirement, and it relates to establishing the objective well-foundedness of the [claimant's] subjective fear."

8 *Ward, supra*, footnote 1, at 722.

9 *Ward, supra*, footnote 1, at 724-726.

10 *Ward, supra*, footnote 1, at 726.

11 *Badran, Housam v. M.C.I.* (F.C.T.D., no. IMM-2472-95), McKeown, March 29, 1996, at 3-4.

6.1.6. Burden of Proof

The claimant's burden of presenting "clear and convincing" proof of the state's inability to protect should not be an impossible burden.

> ... it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.[12]

6.1.7. Obligation to Approach the State

A claimant is required to approach his or her state for protection in situations in which protection might reasonably be forthcoming.

> ... the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities: otherwise, the claimant need not literally approach the state.[13]

In other words, the claimant must show that it was reasonable for him or her not to seek state protection.

In *D'Mello,*[14] the Court set aside the decision of the CRDD because the panel's analysis was inadequate with respect to the principle in *Ward* that a claimant should not be required to risk her life seeking ineffective state protection merely to prove the ineffectiveness. In this case,

> the [claimant's] fear did not rest on the lack of legislative and procedural framework in India to protect women abused by their husbands or agents of their husbands, but rather on the lack of police support to such women and the difficulty, given the lack of such support, in effectively taking advantage and having recourse to the existing legislative and procedural framework of state protection in India. (At paragraph 13).

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[12] *Ward, supra*, footnote 1, at 724. This principle was applied in *Aramburo, Juan Carlos v. M.C.I.* (F.C.T.D., no. IMM-6782-93), Cullen, December 7, 1994 (re claimants from Argentina) and in *Lerer, Iakov v. M.C.I.* (F.C.T.D., no. IMM-7438-93), Cullen, January 5, 1995 (re Jewish claimants from Russia).

[13] *Ward, supra*, footnote 1, at 724. See also *Kogan, Meri v. M.C.I.* (F.C.T.D., no. IMM-7282-93), Noël, June 5, 1995, where the Court found that the CRDD could reasonably conclude that the authorities had not refused to protect the claimants given that the claimants had been unable to identify their attackers and had delayed in filing a complaint. On the other hand, in *Medina, Blanca Patricia v. M.C.I.* (F.C.T.D., no. IMM-2322-94), Simpson, October 30, 1995, the Court held that the claimant's failure to approach the state for protection was reasonable in that she had good reasons to believe that her assailants were state security agents. See also footnote 2. In *Farias, Carlos Humbero Gonzales v. M.C.I.* (F.C.T.D., IMM-3305-96), Lutfy, October 3, 1997, the Court stated that the CRDD erred in not specifying what additional steps the claimants should have taken to obtain state protection, especially when the agent of persecution was the state. See also *Quintero, Wilfredo Cruz v. M.C.I.* (F.C.T.D., no. IMM-3447-96), Campbell, June 6, 1997, where the CRDD erred in criticizing the Honduran claimant for not seeking state protection, where the agent of persecution was the National Investigations Authority (DNI).

[14] *D'Mello, Carol Shalini v. M.C.I.* (F.C.T.D., no. IMM-1236-97), Gibson, January 22, 1998.

6.1.8. Rebutting the Presumption of Protection

Absent an admission by the state that it is unable to protect (as was the case in *Ward*), a claimant can establish, with "clear and convincing evidence",[15] that state protection would not be reasonably forthcoming (thus rebutting the presumption) where:

(a) there is a complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*;[16]

(b) there is evidence "...similarly situated individuals [were] let down by the state protection arrangements...;"[17]

(c) there is evidence "...of past personal incidents in which state protection did not materialize."[18]

The Court refers to the Federal Court of Appeal decision in *Satiacum*[19] and quotes with approval the following statement:

> In the absence of exceptional circumstances established by the claimant, it seems to me that in a Convention refugee hearing, as in an extradition hearing, Canadian tribunals have to assume a fair and independent judicial process in the foreign country. In the case of a non-democratic State, contrary evidence might be readily forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching, for example, the jury selection process in the relevant part of the country, or the independence or fair-mindedness of the judiciary itself.[20]

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[15] Some CRDD panels have suggested that the requirement to present "clear and convincing" evidence that the state is unable to protect has effectively raised the standard of proof set in *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.), i.e., "serious possibility". In *Barkai, Alex v. M.E.I.* (F.C.T.D., no. IMM-6249-93), Gibson, September 27, 1994, counsel for the claimant raised this very issue and requested that a question be certified. Gibson J. refused to certify the suggested question and said "... I am satisfied that the analysis of Mr. Justice Laforest [sic] in *Ward* is clear on its face."(at 12) The case law subsequent to *Ward* continues to apply the *Adjei* test.

[16] *Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 605 (C.A.), at 614; *Ward, supra*, footnote 1, at 725.

[17] *Ward, supra*, footnote 1, at 725.

[18] *Ward, supra*, footnote 1, at 725. See also section 6.1.11. of this Chapter.

[19] *M.E.I. v. Satiacum, Robert* (F.C.A., no. A-554-87), Urie, Mahoney, MacGuigan, June 16, 1989. Reported: *Canada (Minister of Employment and Immigration) v. Satiacum* (1989), 99 N.R. 171 (F.C.A.).

[20] *Ward, supra*, footnote 1, at 725 (quoting from *Satiacum*, at 176). See also *M.E.I. v. Hernandez-Ruiz, Maria* (F.C.A., no. A-20-92), Marceau, Létourneau, Robertson, February 8, 1993; *Bukhari, Zubair Hayder v. M.E.I.* (F.C.T.D., no. IMM-6344-93), Richard, November 18, 1994. See also *M.C.I. v. Kadenko, Ninal* (F.C.A., no. A-388-95), Hugessen, Décary, Chevalier, October 15, 1996. Reported: *Canada (Minister of Citizenship and Immigration) v. Kadenko* (1996), 143 D.L.R. (4th) 532 (F.C.A.), (application for leave to appeal dismissed by the S.C.C. on May 8, 1997) where the Federal Court of Appeal noted that the burden of proof to establish absence of state protection is "directly proportional to the level of democracy in the state in question..."; and *Smith: M.C.I. v. Smith, Bob* (F.C.T.D., no. IMM-3068-97), Lutfy, December 7, 1998, where the Court stated

In addition to the above principles articulated by the Supreme Court of Canada in *Ward*, the following principles have emerged from other cases.

6.1.9. More Than One Authority in the Country

The Court of Appeal in *Zalzali*[21] recognized that there may be several established authorities in a country which are each able to provide protection in the part of the country controlled by them.

> The "country", the "national government", the "legitimate government", the "nominal government" will probably vary depending on the circumstances and the evidence and it would be presumptuous to attempt to give a general definition. I will simply note here that I do not rule out the possibility that there may be several established authorities in the same country which are each able to provide protection in the part of the territory controlled by them, protection which may be adequate though not necessarily perfect.[22]

In *Chebli-Haj-Hassam*,[23] the Federal Court of Appeal answered a certified question on this matter as follows:

> In the circumstances where there is a legitimate government supported by the forces of another government and there is no difference in interest between the two governments in relation to a refugee claimant, the protection given to the claimant is adequate to establish an internal refuge.

In *Choker*,[24] the Court appears to question the reasonableness of the CRDD conclusion that a Lebanese claimant could and should seek the protection of an invading army (the Court was considering whether the tribunal had applied the law on IFA correctly.)

6.1.10. Adequacy of Protection - Standard

One aspect of protection which was not discussed by the Supreme Court of Canada in *Ward* is the standard of protection that a country needs to offer its citizens. One standard suggested by the Federal Court of Appeal is "...adequate though not necessarily perfect".[25] This standard has been followed and applied in a large number of cases.

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that "the quantum of clear and convincing evidence required to rebut the presumption of a state's ability to protect will depend on its democratic processes."

[21] *Zalzali, supra*, footnote 16.

[22] *Zalzali, supra*, footnote 16, at 615. Applied in *Sami, Sami Qowdon v. M.E.I.* (F.C.T.D., no. A-627-92), Simpson, June 1, 1994 (re Somaliland). See also *Saidi, Ahmed Abrar v. M.E.I.* (F.C.T.D., no. A-749-92), Wetston, September 14, 1993, at 3 (re IFA in North Somalia).

[23] *Chebli-Haj-Hassam, Atef v. M.C.I.* (F.C.A., no. A-191-95), Marceau, MacGuigan, Décary, May 28, 1996. Reported: *Chebli-Haj-Hassam v. Canada (Minister of Citizenship and Immigration)* (1996), 36 Imm. L.R. (2d) 112 (F.C.A.).

[24] *Choker, Ali v. S.G.C.* (F.C.T.D., no. A-1345-92), Dubé, July 30, 1993. See also section 6.1.11. of this Chapter.

[25] *Zalzali, supra*, footnote 16, at 615.

In *Villafranca*,[26] the Court of Appeal, considering the claim of a Philippine policeman who feared a terrorist guerrilla group, again suggested that protection need not be perfect:

> No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times. Thus it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation. Terrorism in the name of one warped ideology or another is a scourge afflicting many societies today; its victims, however much they may merit our sympathy, do not become Convention refugees simply because their governments have been unable to suppress the evil. ... where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection.[27]

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[26] *M.E.I. v. Villafranca, Ignacio* (F.C.A., no. A-69-90), Hugessen, Marceau, Décary, December 18, 1992. Reported: *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.).

[27] *Villafranca, ibid.*, at 132-133. (It should be noted that the Court in *Villafranca* analyzed the issue of protection in the context of a democratic country. Quaere whether the same analysis would hold for a non-democratic country). It has been suggested that *Villafranca* is bad law in light of *Ward*, see for example, Waldman, L., *Immigration Law and Practice*, (Toronto: Butterworths Canada Ltd., 1992) paragraph 8.88, however, in *Velarde-Alvarez, Jorge Luis v. S.S.C.* (F.C.T.D., no. IMM-194-94), McKeown, February 9, 1995. Reported: *Velarde-Alvarez v. Canada (Secretary of State)* (1995), 27 Imm. L.R. (2d) 88 (F.C.T.D.), the Court stated, at 92, that *Villafranca* dealt with the problems of "unable" in a manner not inconsistent with *Ward*. Given that *Villafranca* was decided before *Ward*, Mr. Justice McKeown, agreed to certify the following question:

> May evidence satisfy the threshold test of "clear and convincing confirmation" of a state's inability to protect the refugee claimant where
>
> 1) there is no state of civil war, invasion or total collapse of internal order, and where
>
> 2) the government is otherwise in effective control of its territory, has military, police and civil authority in place, and has made serious efforts to protect its citizens? [Note: as of January 2000, the Court of Appeal has not dealt with this case and it is unlikely it will.]

In *Karaseva, Tatiana v. M.C.I.* (F.C.T.D., no. IMM-4683-96), Teitelbaum, November 26, 1997, the claimant argued that *Ward* had overturned *Villafranca*, whereas the Minister contended the opposite relying on *Starikov, Nicolai v. M.C.I.* (F.C.T.D., no. IMM-1200-95, Pinard, 10 April 1996, where the court clearly considered that the principles in *Ward* and *Villafranca* can apply simultaneously. The Court did not specifically address these arguments but concluded as follows:

> [28] After considering the evidence, I am satisfied that the applicants have not provided "clear and convincing proof" that the State [Kazakhstan] would not be able to protect them. It does not appear that the applicants could provide the police with sufficient evidence to mount a successful investigation. The police must be given adequate tools in order to investigate a crime and information as to the criminals is a key tool. Furthermore, from a reading of the transcript, I am satisfied the applicants did not take a concerned interest in the reporting or findings of the police.

There are a few cases from the Trial Division which take a wide view of protection. For example, in *Bobrik*,[28] Madam Justice Tremblay-Lamer, in considering the claims of a Jewish couple from Russia stated that:

> ... even when the state is willing to protect its citizens, a claimant will meet the criteria for refugee status if the protection being offered is ineffective. A state must actually provide protection, and not merely indicate a willingness to help. Where the evidence reveals that a claimant has experienced many incidents of harassment and/or discrimination without being effectively defended by the state, the presumption operates and it can be concluded that the state may be willing but unable to protect the claimant.

Mr. Justice Gibson, in *Smirnov*,[29] stated that in his view, "... [*Bobrik*] sets too high a standard for state protection...". He further indicated that:

> Random assaults such as those suffered by the [claimants], where the assailants are unknown to the victim and there are no independent witnesses are also difficult to effectively investigate and protect against. In all such circumstances, even the most effective, well-resourced and highly motivated police forces will have difficulty providing effective protection. This Court should not impose on other states a standard of "effective" protection that police forces in our own country, regrettably, sometimes only aspire to.

In *James*,[30] the Court noted that "a finding of adequate protection cannot flow from police assistance to leave the country that is unable to provide adequate protection."

In *Milev, Dane v. M.C.I.* (F.C.T.D., no. IMM-1125-95), MacKay, June 28, 1996, the Court noted, at 5, that "[t]he fact that the state does not provide perfect protection is not, in itself, a basis for determining that the state is unwilling or unable to offer reasonable protection in the circumstances." In *Guirgas, Nabil v. M.C.I.* (F.C.T.D., no. IMM-2131-96), Jerome, August 20, 1997, the claimant, a Coptic Christian, feared the Islamic extremists. The Court noted that the state (Egypt) was intent on combating the extremists and had acted in that regard.

[28] *Bobrik, Iouri v. M.C.I.* (F.C.T.D., no. IMM-5519-93), Tremblay-Lamer, September 16, 1994, at 4. See also *Howard-Dejo, Luis Fern v. M.C.I.* (F.C.T.D., no. A-1179-92), Noël, February 2, 1995, where the Court noted that the evidence in the case did not demonstrate merely that the state (Peru) was not always successful in protecting the targets of terrorism but that the authorities were unable to offer protection proportionate to the threat. Also, *Freiberg, Valentina v. S.S.C.* (F.C.T.D., no. IMM-3419-93), Tremblay-Lamer, May 27, 1994, where the Court concluded that the claimant "related two incidents in which she filed complaints with the police [in Israel] and in which state protection did not materialize ... this evidence suffices to justify the [claimant's] reluctance to seek protection from the state." (at 6-7). *Freiberg* was not followed in *Fainshtain, Galine v. M.C.I.* (F.C.T.D., no. IMM-1012-95), Muldoon, June 17, 1996, where Muldoon noted, at 5-6, that the case was distinguishable on its facts. "In that case, the police *refused* to intervene. Here, the police offered assistance. It was the principal [claimant] who either did not avail herself of those offers of assistance, or prevented the State from according her its protection by either not giving State authorities details of her plight, or by not reporting her plight to State authorities."

[29] *Smirnov v. Canada (Secretary of State)*, [1995] 1 F.C. 780 (T.D.), at 786. For a case where the facts established that the attacks were not random but targeted, see *Badran, supra*, footnote 11.

[30] *James, Cherrie Ann Louanne v. M.C.I.* (F.C.T.D., no. IMM-3352-97), Wetston, June 1, 1998. Reported: *James v. Canada (Minister of Citizenship and Immigration)* (1998), 44 Imm. L.R. (2d) 16 (F.C.T.D).

6.1.11. Source of Protection

As to whether the claimant needs to seek protection from sources other than the state, there are only a few cases dealing with the issue. In *Thakur*, the Trial Division seems to say that the fact that civil rights groups are able to conduct investigations of alleged abuses is irrelevant to the question of protection.[31]

A similar point was made in *Risak*,[32] where the Court also considered the claimant's obligation to pursue further legal remedies after initial complaints to the state's authorities fail:

> … the question is whether or not it was objectively reasonable to expect the [claimant] to have further sought the protection from the army and the police in Israel after having been so brutally rebuffed by the very authorities from whom citizens expect protection. There is nothing in our jurisprudence to the effect that in such situations the [claimant] has the further burden to seek assistance from human rights organizations or, ultimately, to launch an action in court against the government.

A related question is whether one can say that the state has failed to provide protection where the protection is denied by certain elements of the state, for example, individual police officers. In *Kadenko*,[33] the Court of Appeal dealt with the following certified question:

> Where there has not been a complete breakdown of the government apparatus and where a State has political and judicial institutions capable of protecting its citizens, does the refusal by certain police officers to take action suffice to establish that that State in question is unable or unwilling to protect its nationals?

The court answered the question in the negative:

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[31] *Thakur, Ramesh Chander v. M.E.I.* (F.C.T.D., no. 92-T-1665), Dubé, June 18, 1993. The Trial Division has, in a number of decisions, accepted that the availability of protection from non-state sources may, nevertheless, be relevant to establishing an objective basis for the claim. See for example: *Fernandez, Laura v. M.E.I.* (F.C.T.D., no. IMM-4591-93), Wetston, July 19, 1994, at 2; *Contreras, Carlos Fabian Vassallo v. M.C.I.* (F.C.T.D., no. IMM-2555-94), MacKay, May 19, 1995. Reported: *Contreras v. Canada (Minister of Citizenship and Immigration)* (1996), 36 Imm. L.R. (2d) 75 (F.C.T.D.); *Sandy*, *supra*, footnote 7, at 3.

[32] *Risak, Boris v. M.E.I.* (F.C.T.D., no. IMM-6087-93), Dubé, October 24, 1994. Reported: *Risak v. Canada (Minister of Employment and Immigration)* (1994), 25 Imm. L.R. (2d) 267 (F.C.T.D.), at 270. In *Mendoza, Elizabeth Aurora Hauayek v. M.C.I.* (F.C.T.D., no. IMM-2997-94), Muldoon, January 24, 1996, at 6, the Court stated the test as follows: "It matters not that there were available human rights organizations [in Venezuela] to whom the [claimant] could have turned for help. The test is whether the [claimant] can look to his/her own government for protection." The same approach was followed in *Cuffy, Loferne Pauline v. M.C.I.* (F.C.T.D., no. IMM-3135-95), McKeown, October 16, 1996, at 3-4.

[33] *M.C.I. v. Kadenko, Ninal* (F.C.A), *supra*, footnote 20; *Levkovicz, Ilia v. S.S.C.* (F.C.T.D., no. IMM-599-94), Nadon, March 13, 1995. See also *Vielma, Eduardo Enrique Pena v. M.C.I.* (F.C.T.D., no. IMM-786-94), Rothstein, November 10, 1994, which deals with a situation where police were involved in actions against journalists (like the claimant) and the Court stated: "… it is at least questionable which state authorities the claimant could ask to protect him …" in those circumstances (at 3); and *Machado, Hugo Ricardo Gonzalez v. M.C.I.* (F.C.T.D., no. IMM-7155-93), Rothstein, October 27, 1994.

> Once it is assumed that the state (Israel in this case) has political and judicial institutions capable of protecting its citizens, it is clear that the refusal of certain police officers to take action cannot in itself make the state incapable of doing so. …
>
> When the state in question is a democratic state … the claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her. (at 2-3)

6.2. STATELESS CLAIMANTS

As to whether stateless claimants need to avail themselves of state protection, the UNHCR *Handbook*, in paragraph 101 states that "…[i]n the case of a stateless refugee, the question of 'availment of protection' of the country of his former habitual residence does not, of course, arise…"

In *El Khatib*,[34] Mr. Justice McKeown agreed with this approach and stated:

> … the discussion and conclusions reached in *Ward* apply only to citizens of a state, and not to stateless people. In my view the distinction between paragraphs 2(1)(a)(i) and 2(1)(a)(ii) of the *Act* is that the stateless person is not expected to avail himself of state protection when there is no duty on the state to provide such protection.[35]

However, other Trial Division decisions have taken into account state protection that might be available to the claimant in his country of former habitual residence.[36] For example, in

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[34] *El Khatib, Naif v. M.C.I.* (F.C.T.D., no. IMM-5182-93), McKeown, September 27, 1994.

[35] *El Khatib, ibid.*, at 2. The Court agreed to certify the following question:

> On a claim to Convention refugee status by a stateless person, is the "well-foundedness" analysis set out by the Supreme Court of Canada in [*Ward*] applicable, based as it is on the availability of state protection, or is it only applicable if the claimant is a citizen of the country in which he or she fears persecution?

The Court of Appeal, in dismissing the appeal in *El Khatib*, declined to deal with the certified question because it was not determinative of the appeal. See *M.C.I. v. El Khatib, Naif* (F.C.A., no. A-592-94), Strayer, Robertson, McDonald, June 20, 1996. In *Tarakhan, Ali v. M.C.I.* (F.C.T.D., no. IMM-1506-95), Denault, November 10, 1995. Reported: *Tarakhan v. Canada (Minister of Citizenship and Immigration)* (1995), 32 Imm. L.R. (2d) 83 (F.C.T.D.), at 89, the Court held that where the claim is that of a stateless person, the claimant need only show that he or she is unable, or by reason of a well-founded fear of persecution, is unwilling to return to the country of former habitual residence. The claimant does not have to prove that the authorities of that country are unable or unwilling to protect him or her. In *Pachkov, Stanislav* v. M.C.I. (F.C.T.D., no. IMM-2340-98), Teitelbaum, January 8, 1999, the Court held that the CRDD erred in imposing on the claimant, who was a stateless person, a duty to refute the presumption of state protection.

[36] *Giatch, Stanislav v. M.E.I.* (F.C.T.D., no. IMM-3438-93), Gibson, March 22, 1994; *Zaidan, Bilal v. S.S.C.* (F.C.T.D., no. A-1147-92), Noël, June 16, 1994; *Zvonov, Sergei v. M.E.I.* (F.C.T.D., no. IMM-3030-93), Rouleau, July 18, 1994. Reported: *Zvonov v. Canada (Minister of Employment and Immigration)* (1994), 28

Nizar[37] the Court was of the view that, even though states owe no duty of protection to non-nationals, "it is relevant for a stateless person, who has a country of former habitual residence, to demonstrate that *defacto* [sic] protection within that state, as a result of being resident there is not likely to exist." The Court reasoned that this was relevant to the well-foundedness of the claimant's fear.

The Federal Court of Appeal in *Thabet,*[38] in the context of discussing whether a stateless claimant who has more than one country of former habitual residence must establish the claim with respect to one, some or all of the countries[39], had this to say about the issue of state protection:

> ... The definition takes into account the inherent difference between those persons who are nationals of a state, and therefore are owed protection, and those persons who are stateless and without recourse to state protection. Because of this distinction one cannot treat the two groups identically, even though one should seek to be as consistent as possible. (At 33).
>
> ... If it is likely that a person would be able to return to a country of former habitual residence where he or she would be safe from persecution, that person is not a refugee. This means that the claimant would bear the burden ... of showing on the balance of probabilities that he or she is unable or unwilling to return to any country of former habitual residence. (At 39).

6.3. APPLICATION OF THE LAW TO SPECIFIC SITUATIONS[40]

In analyzing the situation in Peru (on the basis of the evidence filed in the particular case), the Court of Appeal stated:

> Isolated cases of persons having been victimized may not reverse the presumption. A state of profound unrest with ineffective protection for the claimant may, however, have reversed it.[41]

Imm. L.R. (2d) 23 (F.C.T.D.); *Falberg, Victor v. M.C.I.* (F.C.T.D., no. IMM-328-94), Richard, April 19, 1995. This issue was further confused by the decision in *M.C.I. v. Vickneswaramoorthy, Poologam* (F.C.T.D., no. IMM-2634-96), Jerome, October 2, 1997, where the Court suggested that the same standard of proof to demonstrate the state's inability to protect persecuted individuals applies to stateless persons as to those with a country of nationality.

37 *Nizar v. M.C.I.* (F.C.T.D., no. A-1-92), Reed, January 10, 1996, at 5.

38 *Thabet, Marwan Youssef v. M.C.I.* (F.C.A., no. A-20-96), Linden, McDonald, Henry, May 11, 1998. Reported: *Thabet v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 F.C. 21 (C.A.).

39 See Chapter 2, Addendum 2, section 2.2.2.

40 The examples are not exhaustive.

41 *Mendivil, Luis Altamirano v. S.S.C.* (F.C.A., no. A-132-93), Marceau, Stone, Desjardins, February 7, 1994. Reported: *Mendivil v. Canada (Secretary of State)* (1994), 23 Imm. L.R. (2d) 225 (F.C.A.), at 232, per Desjardins J.A. In *Oblitas, Jorge v. M.C.I.* (F.C.T.D., no. IMM-2489-94), Muldoon, February 2, 1995, the Court goes so far as to say, at 9, that while the situation in Peru is not quite one of state breakdown (as in *Zalzali, supra*, footnote 16), it comes close. In the Court's view, the claimants had proven that state protection was not reasonably forthcoming.

The protection which is given to ordinary citizens may not be adequate for persons specifically targeted. Although the state is capable of protecting ordinary citizens, it may be incapable of protecting persons specifically targeted, and the latter may therefore have good grounds for fearing persecution.[42]

The claimant may show that he or she is physically prevented from seeking state protection or that the state is prevented from giving the protection, where, for example, the state refuses to give protection,[43] there is no government to turn to,[44] or there is ineffective state protection.[45]

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[42] *Mendivil, ibid.*, at 230. The case involved a claimant who had been specifically targeted by the Shining Path (Sendero Luminoso) in Peru. In *Yanahida, Gustavo Angel Castro v. S.G.C.* (F.C.T.D., no. IMM-6019-93), Richard, October 13, 1994, on the other hand, the claimant failed to present "clear and convincing proof" that the state (Peru) was unable to protect him. The evidence of the claimant was that the protection of ordinary citizens was the lowest priority. The Court held, at 4, that "[i]n the absence of any additional evidence, I consider that the claimant has not discharged his burden." (at 4) The state's obligation to provide private (24-hour) protection to its citizens was considered, and found not to be determinative, in *Baldizon-Ortegaray, German Jose v. M.E.I.* (F.C.T.D., no. 92-T-1933), May 7, 1993. Reported: *Baldizon-Ortegaray v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 307 (F.C.T.D.), a pre-*Ward* case, at 311. See also *Velarde-Alvarez, supra*, footnote 27, at 91; *Yaguna, Jose Stalin Rojas v. M.C.I.* (F.C.T.D., no. IMM-2468-94), Simpson, May 25, 1995, at 5; and *Petit, Juan Daniel Ayllon v. M.C.I.* (F.C.T.D., no. A-1197-92), Rouleau, January 12, 1996, at 6.

[43] *M.E.I. v. Johan, Stephen* (F.C.T.D., no. T-1389-92), Denault, February 9, 1993; *Callejas, Ana Lucretia v. M.E.I.* (F.C.T.D., no. A-48-93), Gibson, February 1, 1994. Reported: *Callejas v. Canada (Minister of Employment and Immigration)* (1994), 23 Imm. L.R. (2d) 253 (F.C.T.D.), at 258-260; *Kraitman, Vadim v. S.S.C.* (F.C.T.D., no. IMM-88-94), Teitelbaum, July 5, 1994. Reported: *Kraitman v. Canada (Secretary of State)* (1994), 27 Imm. L.R. (2d) 283 (F.C.T.D.), where the evidence indicated that the police in Ukraine refused to investigate complaints made by Jews. The Court concluded, at 13, that "[t]his is clear indication that Jews were not being offered the protection of the state, that is, Jews could not go to the police for protection. The police may have the ability to offer protection but where it chooses not to, this is equivalent to saying it is unable to provide protection to the [claimants]." In another case dealing with a claimant from Colombia, *Bohorquez, Gabriel Enriquez v. M.C.I.* (F.C.T.D., no. IMM-7078-93), McGillis, October 6, 1994, the Court found the conclusion of the CRDD that the claimant had failed to provide "clear and convincing proof" unreasonable: "The credible and uncontradicted evidence of the [claimant] established that he sought the help of various police and enforcement agencies on fifteen or twenty occasions. The [claimant] was repeatedly told that nothing could be done to protect him and no investigation into the source of the threats or the attempted assassination was ever conducted." (at 3)

[44] *Zalzali, supra*, footnote 16. However, for the principle in *Zalzali* to apply, the claimant must demonstrate a prospective risk of persecution, thus, in *Roble, Abdi Burale v. M.E.I.* (F.C.A., no. A-1101-91), Heald, Stone, McDonald, April 25, 1994. Reported: *Roble v. Canada (Minister of Employment and Immigration)* (1994), 169 N.R. 125 (F.C.A.), where the agent of persecution (the NSS in Somalia) was no longer a factor, the Court held that "... the inability of the state to protect the [claimant] is not, in itself, a sufficient basis for his claim." (at 130).

[45] *Ward*; *supra*, footnote 1, *Surujpal, Khemraj v. M.E.I.* (F.C.A., no. A-515-84), Mahoney, Stone, MacGuigan, April 25, 1985. Reported: *Surujpal v. Canada (Minister of Employment and Immigration)* (1985), 60 N.R. 73 (F.C.A.); *Rajudeen, Zahirdeen v. M.E.I.* (F.C.A., no. A-1779-93), Heald, Hugessen, Stone (concurring), July 4, 1984. Reported: *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129 (F.C.A.). In a case involving Peru, *Gonzales, Abel Guillermo Mayorga v. M.E.I.* (F.C.T.D., no. IMM-117-93), Noël, February 25, 1994, the Court noted, at 3, that the evidence showed that the army had been infiltrated by the terrorists and that it was powerless against their attacks. In the circumstances, it was unreasonable for the CRDD to conclude "... that the [claimant] was likely to be given adequate protection."

Where the agent of persecution acts on behalf of the state, the appropriate inquiry is under the "unwilling" branch of the definition.

> While it may not be necessary to prove state complicity in certain situations, in this instance, the tribunal admitted that the persecuting agents were thugs of the ruling UNP. As such, the determination to be made is squarely within the "unwilling" branch of ... the definition. Since the persecuting agent is the state or its actors, the appropriate inquiry is whether the [claimants'] unwillingness to seek the protection of Sri Lanka is based on a well-founded fear of persecution. The Board made a fundamental error when it stated that "it is also not satisfied that the state is either unable or unwilling to offer protection should the female claimant decide to seek such protection." The question is not whether the state would be willing to protect, but whether the applicant is willing to seek the protection of the state. It is the well-foundedness of the [claimant's] perspective regarding the state's actions which is determinative."[46]

Where the claimant fears the army and the evidence establishes that the army is in control of the entire territory, particularly if the country is small, the claimant may be unable to seek the protection of the state.[47]

Where there is widespread violence and the state fails to take effective steps to curb it despite repeated promises to do so, it is unreasonable to conclude that a claimant could rely on that state for protection.[48]

In cases of domestic or sexual violence, where there is evidence that the government is taking steps to protect women, in the absence of evidence to the contrary, it must be presumed that these steps will be effective.[49] Whether a request for protection is useless after a rape has occurred is not the issue, but rather whether the state is willing, able and disposed to protect a claimant in the face of such acts if she were to return.[50]

In deciding whether a claimant can count on the protection of the state, one must consider not only the state's ability to protect, but also its willingness. While the Ghanian government had sometimes shown an intention to make female circumcision illegal, it was still tolerating the practice.[51] On the other hand, in a case where the claimant feared ritual murder in Ghana, the Court noted that that practice was officially condemned by the government and that the claimant

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[46] *Silva, Donakanthi Sujatha v. M.E.I.* (F.C.T.D., no. IMM-4584-93), Denault, August 3, 1994, at 2-3.

[47] *Soopramanien, Dorothy Anette v. S.G.C.* (F.C.T.D., no. A-1572-93), Pinard, October 5, 1993, at 2 (re Seychelles).

[48] *Barabhuiyan, Abdullah Al Mamun v. M.E.I.* (F.C.T.D., no. A-998-92), Tremblay-Lamer, November 30, 1993 (re Bangladesh).

[49] *Manorath, Rahonie v. M.C.I.* (F.C.T.D., no. IMM-2369-94), Cullen, January 26, 1995, at 6. But see *Williams, Debby v. S.S.C.* (F.C.T.D., no. IMM-4244-94), Reed, June 30, 1995.

[50] *Levitina (Chikhovtseva), Tatiana v. M.C.I.* (F.C.T.D., no. IMM-6591-93), Noël, January 27, 1995, at 3.

[51] *Annan v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 25 (T.D.), at 30.

never sought the protection of the authorities nor showed that they had failed or refused to protect him.[52]

[52] *Mallam, Sanni Mohammad v. M.C.I.* (F.C.T.D., no. IMM-2780-96), Pinard, June 30, 1997.

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CHAPTER 7

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CHAPTER 7

7. CHANGE OF CIRCUMSTANCES AND COMPELLING REASONS[1]

7.1. CHANGE OF CIRCUMSTANCES

The question raised by a claim to refugee status is not whether the claimant had reasons to fear persecution in the past, but rather whether he or she now, at the time the claim is being decided, has good grounds to fear persecution in the future.[2] That same test is applied in cases where there have been changes in country conditions: the onus does not shift in such cases, nor does the standard of proof which the claimant is required to meet differ.[3]

7.1.1. Standard of Proof and Criteria

As in all other claims before the Refugee Division heard pursuant to section 69.1 of the *Immigration Act*, the test of well-foundedness found in *Adjei*[4] applies to claims involving an assessment of changed or changing country conditions.[5]

The Trial Division generated a considerable body of case law in which divergent positions were taken on the applicability of the so-called "Hathaway test"[6] in assessing claims where there

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1 See also *Commentary on Change of Circumstances*, IRB Legal Services, September 1994. The commentary should be read with caution as it pre-dates the seminal judgment of the Court of Appeal in *Yusuf, Sofia Mohamed v. M.E.I.* (F.C.A., no. A-130-92), Hugessen, Strayer, Décary, January 9, 1995. Reported: *Yusuf v. Canada (Minister of Employment and Immigration)* (1995), 179 N.R. 11 (F.C.A.), leave to appeal to the S.C.C. denied June 22, 1995.

2 *Mileva v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 398 (C.A.) at 404, per Pratte J.A. Although this case concerned an initial (credible basis) hearing (since abolished by Bill C-86), the principle is applicable to determinations by the Refugee Division. See also *Paszkowska: M.E.I. v. Paszkowska, Malgorzata* (F.C.A., no. A-724-90), Hugessen, MacGuigan, Décary, April 16, 1991. Reported: *Canada (Minister of Employment and Immigration) v. Paszkowska* (1991), 13 Imm. L.R. (2d) 262 (F.C.A.).

3 *Yusuf, supra*, footnote 1, at 1-2 (unreported); at 12 (reported).

4 *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.).

5 In *Stoyanov, Gueorgui Ivanov v. M.E.I.* (F.C.A., no. A-206-91), Hugessen, Mahoney, Décary, April 26, 1993, at 2, Mr. Justice Hugessen, speaking for the Court, stated: "...when the Division has a refugee claim before it, it must apply the test stated by this Court in *Adjei*, and not...the test (assuming that it is different) that would apply to an application for loss of status ("cessation") made by the Minister under s. 69.2." Some decisions of the Trial Division have, in the context of the debate on the "Hathaway test", taken the position that there may be a different (i.e. higher) standard of proof that is applied at a cessation hearing under section 69.2 of the Act, e.g. *Villalta, Jairo Francisco Hidalgo v. S.G.C.* (F.C.T.D., no. A-1091-92), Reed, October 8, 1993; *Magana, Douglas Ivan Ayala v. M.E.I.* (F.C.T.D., no. A-1670-92), Rothstein, November 10, 1993. Reported: *Magana v. Canada (Minister of Employment and Immigration)* (1993), 22 Imm. L.R. (2d) 300 (F.C.T.D.). See, however, *Youssef, Sawsan El-Cheikh v. M.C.I.* (F.C.T.D., no. IMM-990-98), Teitelbaum, March 29, 1999, which actually dealt with a cessation application, for a different view.

6 James C. Hathaway, in *The Law of Refugee Status* (Toronto: Butterworths, 1991), at pages 200-203. When discussing the cessation clause, which has been incorporated into section 2(2)(e) of the *Immigration Act*,

have been changes in country conditions since the claimant's departure from his or her country of nationality.

The issue was clarified by the Court of Appeal in *Yusuf*[7] which explicitly rejected the notion that there is a separate legal test by which the changed circumstances must be measured. Mr. Justice Hugessen stated for the Court:

> ...the issue of so-called "changed circumstances" seems to be in danger of being elevated, wrongly in our view, into a question of law when it is, at bottom, simply one of fact. A change in the political situation in a claimant's country of origin is only relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant will be persecuted in the event of return there. That is an issue for factual determination and there is no separate legal "test" by which any alleged change in circumstances must be measured. The use of words such as "meaningful", "effective" or "durable" is only helpful if one keeps clearly in mind that the only question, and therefore the only test, is that derived from the definition of Convention Refugee in s.2 of the *Act*: does the claimant now have a well-founded fear of persecution?

In the subsequent decision of the Court of Appeal in *Rahman*,[8] Mr. Justice Robertson further stated on this issue:

> This Court has previously held in *Yusuf*...that the issue of "changed circumstances" is essentially one of fact. Indeed, what is important is not so much the change as the actual circumstances existing in the claimant's country of origin. The question is whether those circumstances support the claimant's alleged well-founded fear of persecution.

Professor Hathaway stated that the changes must be shown to be of substantial political significance, truly effective, and durable.

[7] *Yusuf, supra*, footnote 1, at 1-2 (unreported); at 12 (reported). There is dicta, however, in an earlier decision of the Court of Appeal, that may be potentially problematic. *In Ahmed, Ali v. M.E.I.* (F.C.A., no. A-89-92), Marceau, Desjardins, Décary, July 14, 1993. Reported: *Ahmed v. Canada (Minister of Employment and Immigration)* (1993), 156 N.R. 221 (F.C.A.), at 223-224, Marceau J.A. stated, (in relation to the CRDD's finding that with the change in government in Bangladesh, the claimant's fear was no longer well founded), that this ground does not entail "a mere finding of fact drawn directly from the evidence...the evidence has to be interpreted and inferences must be drawn from it in relation to legal concepts and provisions of law. ...the mere fact that there has been a change of government is clearly not in itself sufficient to meet the requirements of a change of circumstances which have rendered the genuine fear of a claimant unreasonable and hence without foundation." *Ahmed* can be reconciled with *Yusuf, supra*, footnote 1, if one bears in mind that in *Ahmed* the Court was relating the change to the objective basis of the claim (i.e. the *Adjei* test). Hence the view expressed in *Oduro, Ebenezer v. M.E.I.* (F.C.T.D., no. IMM-903-93), McKeown, December 24, 1993, at 3, that the Federal Court (in *Ahmed*) "has determined that the determination of change in circumstances is a mixed question of fact and law."

[8] *Rahman, Sheikh Mohammed Mostafizur v. M.E.I.* (F.C.A., no. A-398-92), Hugessen, Létourneau, Robertson, March 3, 1995, at 1.

7.1.2. Application

It follows, from the foregoing, that changes that fall short of the criteria put forth by Professor Hathaway may also be relevant for an assessment of the claimant's fear of persecution and should be weighed, in the balance, along with all the other relevant evidence in the claim.[9]

In *Sukhraj Singh*,[10] the Court recognized that the documentary evidence in a particular case may not be unequivocal as to the political situation in a country, and even contradictory in certain areas. (It is up to the CRDD to assess whether the evidence is sufficient to support its conclusion. In so doing, it can reasonably rely on evidence it considers most consistent with reality.) Moreover, improved country conditions may be found to be sufficient given the claimant's circumstances, notwithstanding the fact that there are improvements yet to be achieved.[11]

The Trial Division held, in *Barreto*,[12] that there is no statutory requirement that compels a consideration of section 2(2)(e) of the Act when assessing whether, in light of a change in country conditions, the claimant's fear is objectively well founded. Moreover, a change in country conditions may be assessed not as an independent and overriding consideration, but as part of a blended assessment of well-foundedness along with other factors such as passage of time and lack of continued interest in the claimant by the agent of persecution.[13]

In *Penate*,[14] Madam Justice Reed of the Trial Division provided the following guidance on the relevance of the "Hathaway criteria" in assessing the present well-foundedness of a claim:

> ...when a panel is weighing changed country conditions together with all the evidence in [a claimant's] case, factors such as durability, effectiveness and substantiality are still relevant. The more durable the changes are demonstrated to be, the heavier they will weigh against granting the [claimant's] claim. In addition, if a panel has in fact made a determination that status would have existed but for changed circumstances (that is, if it has voluntarily adopted that type of conceptual analysis) then a more

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[9] *Villalta, supra*, footnote 5, at 7, where the Court went on to hold that the Board need not engage in "the conceptual exercise of subtracting changed country conditions from their analysis, and then, after making that analysis, move on to assess the significance of changed country conditions." See also *Barreto, Hugo Cesar Ghan v. M.C.I.* (F.C.T.D., no. IMM-3987-94), Wetston, June 7, 1995, where the Court states at 9: "When the Board discusses change in country conditions, it does so as part of its determination of whether the [claimants'] fear was objectively well founded. In this regard, a change in country conditions is one factor, among others, which the Board is entitled to consider in its determination."

[10] *Singh, Sukhraj v. M.C.I.* (F.C.T.D., no. IMM-2803-95), Lutfy, January 10, 1997. See also *Sanoe, Sekou v. M.C.I.* (F.C.T.D., no. IMM-5047-98), Lemieux, September 16, 1999, to the same effect.

[11] *Gill, Jagdip v. M.C.I.* (F.C.T.D., no. IMM-448-97), Lutfy, December 31, 1997.

[12] *Barreto, supra*, footnote 9, at 7-9.

[13] *Kaur, Sarabjit v. M.E.I.* (F.C.T.D., no. IMM-5701-93), Reed, August 19, 1994, at 2; *Alza, Julian Ulises v. M.C.I.* (F.C.T.D., no. IMM-3657-94), MacKay, March 26, 1996; *Hernandez, Fabian Edward v. M.C.I.* (F.C.T.D., no. IMM-2410-95), Jerome, May 10, 1996.

[14] *Penate v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 79 (T.D.), at 95.

rigorous assessment of the changed conditions following the criteria set out by Professor Hathaway will likely be appropriate.

In the following cases, where the claims would have been established but for the changes in country conditions, the dicta of the Court of Appeal indicated that a more rigorous evaluation of the effect of the changes was to be undertaken. In *Ahmed*,[15] the Court referred to "a clear indication of a meaningful and effective change which is required to expunge the objective foundation of the...claim." In *Cuadra*,[16] the Court referred to "the requirement that the change be meaningful and effective enough to render the genuine fear of the [claimant] unreasonable and hence without foundation."

The continued relevance of the "Hathaway factors" was underscored in the case of *Vodopianov*,[17] which overturned a CRDD decision as inadequate because there was no analysis of the meaningfulness, effectiveness and durability of the recent changes in that country. Where the changes are very recent, the evidence must be subjected to a detailed analysis to determine whether this change is significant enough to eliminate the claimant's fear.[18]

On the other hand, where the changes invoked relate to the personal circumstances of an individual for which that individual claimed refugee status, the Court held (in the context of a cessation application) that the Minister does not have the burden of showing that the individual had changed and that the change was durable. It is sufficient that the Board be satisfied that the change of circumstances is significant and effective.[19]

Although the Refugee Division may find that even recent changes are sufficient to remove the basis of the claimant's fear of persecution,[20] it should not rely on or give much, if any, weight

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[15] *Ahmed, supra*, footnote 7, at 224, per Marceau J.A.

[16] *Cuadra, Walter Antonio v. S.G.C.* (F.C.A., no. A-179-92), Isaac, Marceau, Linden, July 20, 1993. Reported: *Cuadra v. Canada (Solicitor General)* (1993), 157 N.R. 390 (F.C.A.), at 392, per Marceau J.A.

[17] *Vodopianov, Victor v. M.E.I.* (F.C.T.D., no. A-1539-92), Gibson, June 20, 1995. See also *Kazi, Feroz Adeel v. M.C.I.* (F.C.T.D., no. IMM-850-97), Pinard, August 15, 1997. Reported: *Kazi v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm. L.R. (2d) 193 (F.C.T.D.), where the Court stated that the key consideration is whether the changes in the political situation are effective and durable, as opposed to merely transitory, and what, if any bearing, these changes have on the claimant's specific situation. On the other hand, in *Nallbani, Ilir v. M.C.I.* (F.C.T.D., no. IMM-5935-98), MacKay, June 25, 1999, the Court stated: "I am not persuaded that the panel had to expressly find the change of circumstances was effective and lasting, rather it was sufficient to find, as it did, that the ... claim was not established prospectively in light of the change in circumstances."

[18] *Kifoueti, Didier Borrone Bitemo v. M.C.I.* (F.C.T.D., no. IMM-937-98), Tremblay-Lamer, February 11, 1999. In this case, as in *Vodopianov, supra*, footnote 17, the changes were so recent that there was no evidence to indicate how the new regime would behave.

[19] *Youssef, supra*, footnote 5.

[20] In *Rahman, Faizur v. M.E.I.* (F.C.A., no. A-1244-91), Marceau, Desjardins, Létourneau, May 14, 1993, at 3, the ouster of President Ershad (in Bangladesh) followed by the electoral victory of the claimant's party, in the view of Marceau J.A., "may, in themselves, recent though they have been, amount to a sufficient change of circumstances, given the basis of the fear on which the [claimant] relied." However, in *Ahmed, supra*, footnote 7, at 224, Marceau J.A. cautioned that "the mere declarations of the new four-month old government that it favoured the establishment of law and order can hardly be seen, when the root of the [claimant's] fear and the past record of the new government with respect to human rights violations are considered, as a clear indication

to changes that are short-lived, transitory, inchoate, tentative, inconsequential or otherwise ineffective in substance or implementation.[21]

Finally, the case law is clear that the changes which are being relied on as removing the reasons for the claimant's fear of persecution are not assessed in the abstract but for their impact on the claimant's particular situation.[22]

7.1.3. Reasons and Assessment of Evidence

The Court of Appeal has pointed out in *Ahmed*[23] that it is not sufficient for the Refugee Division to simply state that a change has taken place (e.g. the declarations of a new government), "without more explanation to establish that the appropriate legal principles were applied."

In the decision of *Mohamed*,[24] Mr. Justice Denault of the Trial Division set out the following helpful checklist or approach:

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of the meaningful and effective change which is required to expunge the objective foundation of the…claim." On the other hand, when dealing with changes of longer duration, in *Ofori, Beatrice v. M.E.I.* (F.C.T.D., no. IMM-3312-94), Gibson, March 14, 1995, the Court stated at 4: "Durability does not equate with permanence. … the concept of meaningful and effective change implies an element of durability, not in an absolute sense but in a comparative sense …" The Court came to a similar conclusion in *Castellanos, Julio Alfredo Vaquerano v. M.C.I.* (F.C.T.D., no. IMM-2082-94), Gibson, October 18, 1994. Reported: *Castellanos v. Canada (Minister of Citizenship and Immigration)* (1994), 30 Imm. L.R. (2d) 77 (F.C.T.D.), where Gibson J. stated, at 80: "... I know of no decision of this court that has adopted the position that changes must be: '... durable in the sense that there is no possible chance of a reversal in the future.'" Moreover, after conceding that "the situation was not perfect and that some unrest continued," the Court in *Belozerova, Natalia v. M.C.I.* (F.C.T.D., no. IMM-912-94), Simpson, May 25, 1995, stated at 4: "No one can predict the future and there is no doubt that, in situations charged with ethnic rivalry, there will always be some uncertainty."

[21] In *Abarajithan, Puramsothy v. M.E.I.* (F.C.A., no. A-805-90), Stone, MacGuigan, Linden, January 28, 1992, the CRDD was found to have relied incorrectly on tentative changes in Sri Lanka (cooperation between the Tigers and the Sri Lankan Army). In *Magana, supra*, footnote 5, at 303-304, the Court categorized the articles published before or at the time of the three-month-old peace accord in El Salvador as "preliminary, tentative indications of the effect of the changes … especially in light of contrary evidence…that the peace process was in danger and death squad activity continued." In *Agyakwah, Elizabeth Lorna v. M.E.I.* (F.C.T.D., no. A-7-93), McKeown, December 10, 1993, the CRDD was found to have erred in relying on the lifting of the ban on political parties just two days prior to the hearing where no change of government had occurred and the poor human rights record of the Ghanaian government was longstanding. In *Antonio, Neto Xavier v. M.C.I.* (F.C.T.D., no. A-472-92), Noël, January 27, 1995, the CRDD erroneously relied on tentative changes in Angola: the peace accord was only a few days old; the same regime was in power; elections were supposed to take place in 18 months; a previous accord had failed; the accord contained no guarantee for former enemies of the regime. In *Chaudary, Imran Akram v. M.C.I.* (F.C.T.D., no. IMM-2048-94), Reed, May 4, 1995, the Court held, at 4, that "a greater possibility of stability" than existed previously did not carry "sufficient weight to counterbalance a finding that an objective basis would otherwise exist."

[22] *Rahman, Faizur, supra*, footnote 20, at 2, per Marceau J.A.: "Whether a change of circumstances is sufficient for a fear of persecution to be no longer well-founded must naturally be determined in relation to the basis of and reasons for the fear relied on." Also *Boateng, Joseph Kwaku v. M.E.I.* (F.C.T.D., no. 92-A-6560), Noël, May 4, 1993, at 3.

[23] *Ahmed, supra*, footnote 7, at 224, per Marceau J.A.

[24] *Mohamed, Mohamed Yasin v. M.E.I.* (F.C.T.D., no. A-1517-92), Denault, December 16, 1993, at 4.

> ... when making a finding on the issue of changes in circumstances the tribunal must, at least, turn its mind to the objective basis of the [claimant's] fear of persecution, the alleged agents of persecution and the form or nature of the persecution feared in order to properly evaluate the effect of the change. This evaluation must relate to the particular circumstances of the [claimant] and the tribunal should provide a clear indication or explanation for its finding.

Furthermore, although there is no requirement to cite every piece of evidence before it, the Refugee Division's reasons should demonstrate that it was not unduly selective, but rather has considered all of the relevant evidence, both that which supports a conclusion of changed country conditions and that which does not, in reaching its decision.[25] Before arriving at a conclusion on the impact of the changes on the claim the Refugee Division should have received evidence that relates specifically to the basis of the claimant's fear of persecution.[26]

7.1.4. Notice

The Trial Division has held that if a change in circumstances is to be relied on in the Refugee Division's reasons, the issue must be raised or notice must be otherwise given at the hearing.[27]

7.1.5. Post-Hearing Evidence

While there is no obligation on the Refugee Division to consider post-hearing evidence relating to changes in country conditions unless that evidence has been submitted by the claimant prior to the issuance of the panel's decision,[28] the Refugee Division may, on its own motion,

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[25] *Chowdhury, Mashiul Haq v. M.E.I.* (F.C.T.D., no. 92-A-6565), Noël, June 2, 1993; *Emnet, Angeset Woldmichael v. M.E.I.* (F.C.T.D., no. 93-A-182), MacKay, August 27, 1993; *Bhuiyan, Nazrul Islam v. M.E.I.* (F.C.T.D., no. 92-A-6737), MacKay, September 13, 1993; *Munkoh, Frank v. M.E.I.* (F.C.T.D., no. IMM-4056-93), Gibson, June 3, 1994; *Ventura, Simon Alberto v. M.E.I.* (IMM-6061-93), Cullen, October 5, 1994; *Hanfi, Aden Abdullah v. M.E.I.* (F.C.T.D., no. A-610-92), Gibson, March 31, 1995. In *Alam, Mohammed Mahfuz v. M.C.I.* (F.C.T.D., no. IMM-4883-97), McGillis, October 7, 1998, the Court held that the CRDD failed to consider the specific evidence that the claimant's problems with the police and with goons of the BNP continued after the election of the Awami League.

[26] *Doganian, Rafi Charvarch v. M.E.I.* (F.C.A., no. A-807-91), Hugessen, MacGuigan, Décary, April 26, 1993; *Boateng; Moz, Saul Mejia v. M.E.I.* (F.C.T.D., no. A-54-93), Rothstein, November 12, 1993. Reported: *Moz v. Canada (Minister of Employment and Immigration)* (1993), 23 Imm. L.R. (2d) 67 (F.C.T.D), the claim was referred back to the CRDD to obtain evidence relating to the treatment of army deserters in El Salvador. In *Ansar, Iqbal v. M.C.I.* (F.C.T.D., no. IMM-4124-97), Campbell, July 22, 1998, the Court held that there was no evidence tendered to support the finding that, because the claimant was a member of the party newly brought to power, he would by that fact alone receive state protection. See also *Vodopianov, supra,* footnote 17, and *Kifoueti, supra,* footnote 18.

[27] *El-Bahisi, Abdelhady v. M.E.I.* (F.C.T.D., no. A-1209-92), Denault, January 4, 1994; *Islas, Alfonso Godinez v. M.C.I.* (F.C.T.D., no. IMM-647-94), Wetston, December 2, 1994; *Herrera, Rosa Adela Barrera v. M.C.I.* (F.C.T.D., no. A-1055-92), MacKay, March 29, 1995.

[28] *Hernandez, Alvaro Odilio Valladares v. M.E.I.* (F.C.A., no. A-210-90), Stone, Linden, McDonald, July 7, 1993. See also *Vairavanathan, Kirijkumari v. M.C.I.* (F.C.T.D., no. IMM-1816-95), Simpson, July 29, 1996. Reported: *Vairavanathan v. Canada (Minister of Citizenship and Immigration)* (1996), 34 Imm. L.R. (2d) 307

reconvene a hearing that has not been concluded with a final decision on the claim to hear evidence relating to new developments in the country of alleged persecution.[29]

7.2. COMPELLING REASONS

7.2.1. Applicability

In the *Obstoj*[30] decision, the Court of Appeal considered the issue of the applicability of the exception found in section 2(3) of the Act ("compelling reasons arising out of any past persecution for refusing to avail ..."), and held that this provision can be properly considered by the Refugee Division in hearings under section 69.1.[31]

In *Cortez*,[32] the Trial Division held that the applicability of section 2(2)(e) and 2(3) of the *Immigration Act* is dependent on a finding that the claimant had a well-founded fear of persecution when the person left his or her country of nationality. The reasons for one's fear of persecution have to have ceased thereafter for the compelling reasons exception to be triggered.[33]

(F.C.T.D.), where the Court held that, though the Board has a duty to receive evidence submitted by the parties at any time until the final decision is rendered, in future cases, counsel who forwards unrequested post-hearing submissions will be expected to obtain from the panel a confirmation of receipt.

[29] *M.E.I. v. Salinas, Marisol Escobar* (F.C.A., no. A-1323-91), Stone, MacGuigan, Henry, June 22, 1992. Reported: *Canada (Minister of Employment and Immigration) v. Salinas* (1992), 17 Imm. L.R. (2d) 118 (F.C.A.).

[30] *Canada (Minister of Employment and Immigration) v. Obstoj*, [1992] 2 F.C. 739 (C.A.), at 746.

[31] Although section 2(3) of the Act is framed as an exception to section 2(2)(e), there is no requirement for a formal determination of cessation of status in the context of a hearing under section 69.1 (as would be required in the context of a hearing under section 69.2).

[32] *Cortez, Delmy Isabel v. S.S.C.* (F.C.T.D., no. IMM-2482-93), McKeown, December 15, 1993, at 2.

[33] There is some case law that gives rise to confusion on this point. For example, in *Chavez-Menendez, Franklin v. M.E.I.* (F.C.T.D., no. IMM-170-93), Gibson, June 16, 1994, the Court, citing *Hassan, Noor v. M.E.I.* (F.C.A., no. A-831-90), Isaac, Heald, Mahoney, October 22, 1992. Reported: *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.), held that the CRDD does not need to apply section 2(2) and 2(3) unless the claimant first falls within the Convention refugee definition in section 2(1). However, there is clear jurisprudence from the Federal Court that in order for the "compelling reasons" exception to apply one does not have to show a subsisting well-founded fear of persecution, e.g. *Obstoj, supra*, footnote 30, at 748, per Hugessen J.A. ("even though they may no longer have any reason to fear further persecution"). This interpretation was followed in *Hassan, Nimo Ali v. M.E.I.* (F.C.T.D., no. A-653-92), Rothstein, May 4, 1994; and *Shahid, Iqbal v. M.C.I.* (F.C.T.D., no. IMM-6907-93), Noël, February 15, 1995. Reported: *Shahid v. Canada (Minister of Citizenship and Immigration)* (1995), 28 Imm. L.R. (2d) 130 (F.C.T.D.). On the other hand, in *Singh, Gurmeet v. M.C.I.* (F.C.T.D., no. IMM-75-95), Richard, July 4, 1995. Reported: *Singh, (Gurmeet) v. Canada (Minister of Citizenship and Immigration)* (1995), 30 Imm. L.R. (2d) 226 (F.C.T.D.), at 230, the Court referred to the fact that the claimant "might at one time have been a Convention refugee" (emphasis added) and seemed to consider circumstances preceding the claimant's departure as relevant to this issue.

In *Corrales,*[34] the Court held that since the CRDD never made a determination that the claimant was a Convention refugee, there was no need for it to consider compelling reasons under section 2(3). Thus, section 2(3) should not be considered if a claimant's factual evidence is not believed.[35]

In *Gurmeet Singh,*[36] the Trial Division considered the issue of the relationship between IFA (internal flight alternative) and change of circumstances and the applicability of the "compelling reasons" exception. The Court concluded that where an IFA applies to a claimant, that person is not and never could have been a Convention refugee. Accordingly, he or she cannot cease to be a Convention refugee and section 2(3) would not apply as this section applies only where the determination of the claim is made, in whole or in part, on the basis of a change of circumstances.[37]

In *Guzman,*[38] the CRDD found, primarily based on the long delay in making their claims, that the claimants lacked a subjective fear. The Court held that the fact that the CRDD then went on to consider changed country conditions, as an additional reason for which to reject the claim, did not eliminate or undermine its earlier finding that the claimants had no subjective fear of persecution. Mr. Justice Rothstein reasoned that

> paragraph 2(2)(e) and subsection 2(3) [i.e. the "compelling reasons" exception] only come into play if there is a finding that the applicants, at least at one time, were Convention refugees. I think this includes a finding that at one time they would have met the definition of Convention refugee. In the present case, there is no such finding.

7.2.2. Duty to Consider

The Trial Division has held that the onus rests on the claimant to raise the issue of "compelling reasons" at the CRDD hearing[39] and to establish that the exception should apply.[40]

The Trial Division held, in *Barreto,*[41] that there is no statutory requirement for the CRDD to consider, in every case, whether a claimant falls within section 2(3) of the Act. If a claimant

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[34] *Corrales, Maria Cecilia Abarca v. M.C.I.* (F.C.T.D., no. IMM-4788-96), Reed, October 3, 1997. See also *Diamanama, Nsimba v. M.C.I.* (F.C.T.D., no. IMM-2288-97), Richard, June 23, 1998.

[35] *Gyamfuah, Cecilia v. M.E.I.* (F.C.T.D., no. IMM-3168-93), Simpson, June 3, 1994. Reported: *Gyamfuah v. Canada (Minister of Employment and Immigration)* (1994), 25 Imm. L.R. (2d) 89 (F.C.T.D.), at 94.

[36] *Singh, (Gurmeet), supra,* footnote 33, at 230. See also *Sangha, Karamjit Singh v. M.C.I.* (F.C.T.D., no. IMM-1555-98), Reed, September 8, 1998.

[37] In *Rabbani, Sayed Moheyudee v. M.C.I.* (F.C.T.D., no. IMM-236-96), Noël, January 16, 1997, the Court held that the CRDD had erred, *inter alia,* because its finding that the claimant had an IFA in Afghanistan was inconsistent with its implied finding that there must have been a fear of persecution throughout the country prior to the change of circumstances.

[38] *Guzman, Jesus Ruby Hernandez v. M.C.I.* (F.C.T.D., no. IMM-3748-97), Rothstein, October 29, 1998.

[39] *Brown, Michael v. M.C.I.* (F.C.T.D., no. IMM-2586-94), Richard, June 23, 1995.

[40] *Mogdadi, Judi Jawdat v. M.C.I.* (F.C.T.D., no. IMM-5807-93), Simpson, May 25, 1995, at 4.

wishes to rely on section 2(3), sufficient evidence must be adduced, in that regard, upon which the CRDD could make such a determination.

The Trial Division, in *Rasanayagam*,[42] held that "[i]f the evidence adduced establishes compelling reasons," the CRDD has "a duty to consider subsection 2(3) regardless of it not being raised by the claimant." In *Hanfi*,[43] for instance, the Court held that, given the experiences of the claimant (repeated imprisonment and torture, deaths or disappearances of family members), it would have been appropriate for the CRDD to address the issue. The converse, also recognized by the Court in *Rasanayagam*,[44] is that if the evidence does not establish compelling reasons, given that the evidentiary burden is on the claimant, there would be no duty to consider section 2(3).

7.2.3. Meaning of "Compelling Reasons"

In *Obstoj*,[45] Mr. Justice Hugessen held that section 2(3) should be read

> as requiring Canadian authorities to give recognition of refugee status on humanitarian grounds to this special and limited category of persons, i.e. those who have suffered such appalling persecution that their experience alone is compelling reason not to return them, even though they may no longer have any reason to fear further persecution.

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[41] *Barreto*, *supra*, footnote 9, at 9.

[42] *Rasanayagam, Shayananthy Christelda v. M.C.I.* (F.C.T.D., no. A-816-91), Wetston, July 25, 1995, at 4. In *Yong-Gueico, Juan Carlos v. M.C.I.* (F.C.T.D., no. IMM-3413-96), Cullen, July 14, 1997. Reported: *Yong-Gueico v. Canada (Minister of Citizenship and Immigration)* (1997), 39 Imm. L.R. (2d) 69 (F.C.T.D.), the Court certified a question regarding the CRDD's obligation in law to consider the application of section 2(3) if the issue is not raised at the hearing.

[43] *Hanfi*, *supra*, footnote 25, at 5-6. See also *Baffoe, George Danso Yaw v. M.C.I.* (F.C.T.D., no. IMM-3216-93), McKeown, September 28, 1994.

[44] *Rasanayagam*, *supra*, footnote 42, at 4. See also *Kazi*, *supra*, footnote 17.

[45] *Obstoj*, *supra*, footnote 30, at 748.

Mr. Justice Hugessen went on to state that "[t]he exceptional circumstances envisaged by subsection 2(3) must surely apply only to a tiny minority of present day claimants."[46] The case law indicates that the threshold necessary to demonstrate "compelling reasons" is a high one.[47] Determining whether, in a given case, there are "compelling reasons" is a question of fact.[48]

In *Arguello-Garcia*,[49] in assessing "the objective factors" (i.e. the claimant's experiences), the Trial Division turned to dictionary definitions of "atrocious" and "appalling" for guidance on the issue of what may be considered sufficiently serious persecution to find "compelling reasons". The Court further stated that in considering the particular persecution experienced, as well as the reasons for it, one must also consider the negative or psychological effect of past persecution.[50]

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[46] This caution was repeated in subsequent decisions of the Federal Court, e.g. *Cortez, supra*, footnote 32, at 2 ("in unusual circumstances"); *Yusuf, supra*, footnote 1, at 1-2 ("that very rare class of persons to whom this exceptional provision applies").

[47] In *Hassan, Nimo Ali, supra*, footnote 33, at 5-6, the Trial Division stated:

> While many refugee claimants might consider the persecution they have suffered to fit within the scope of subsection 2(3) it must be remembered that the nature of all persecution, by definition, involves death, physical harm or other penalties. Subsection 2(3), as it has been interpreted, only applies to extraordinary cases in which the persecution is relatively so exceptional, that even in the wake of changed circumstances, it would be wrong to return refugee claimants.

In *Siddique, Ashadur Rahman v. M.C.I.* (F.C.T.D., no. IMM-4838-93), Pinard, July 18, 1994, the Court upheld the CRDD's finding that the torture the claimant had endured during his 15-day detention in Bangladesh in the early 1980's, albeit abhorrent, did not constitute atrocious persecution. In *Toah, Esther v. S.S.C.* (F.C.T.D., no. IMM-3380-94), Gibson, June 1, 1995, the Court upheld the CRDD's finding that the claimant's detention, torture, beatings and sexual assaults were not "sufficiently serious", "atrocious" or "appalling" to warrant the application of section 2(3). See also similar findings in *Garcia, Rosa Elena Duran v. M.C.I.* (F.C.T.D., no. IMM-2523-95), McKeown, May 10, 1996, where the claimant had been abducted, beaten and raped; and *Nallbani, supra*, footnote, 17, where the claimant had been detained on five occasions, beaten, tortured, deprived of food and drink, and his life threatened. In *Gicu, Andrei Marian v. M.C.I.* (F.C.T.D., no. IMM-2140-98), Tremblay-Lamer, March 5, 1999, the Court pointed out that the events reported by the claimant (internment in a psychiatric hospital for a few months, two periods of imprisonment and beatings during his stays in prison) did not meet the test required by the case law in terms of the level of atrocity. Moreover, given the claimant's adaptability and resourcefulness, it was difficult to conclude he had suffered from a psychological trauma so severe that he continued to be affected by it nearly ten years after it had occurred.

[48] *Rasanayagam, supra*, footnote 42. See also *Shahid, supra*, footnote 33, at 138.

[49] *Arguello-Garcia, Jacobo Ignacio v. M.E.I.* (F.C.T.D., no. 92-A-7335), McKeown, June 23, 1993. Reported: *Arguello-Garcia v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 285 (F.C.T.D.), at 288-289, per McKeown J.: "*The Concise Oxford Dictionary of Current English*, Clarendon Press, Oxford, 1990, contains the following definitions: "atrocious": 1 very bad or unpleasant ... 2 extremely savage or wicked (atrocious cruelty). "Atrocity": 1 an extremely wicked or cruel act, esp. one involving physical violence or injury ... "appalling": shocking, unpleasant; bad." In *Biakona, Leonie Bibomba v. M.C.I.* (F.C.T.D., no. IMM-1706-98), Teitelbaum, March 23, 1999, the Court held that if the CRDD finds the treatment received by the claimant to be revolting or vile and reprehensible, as it did in that case, it should go on to state (which it failed to do) why it concluded that the acts committed cannot be considered compelling reasons.

[50] *Arguello-Garcia, supra*, footnote 49, at 289. See also *Adaros-Serrano, Maria Macarena v. M.E.I.* (F.C.T.D., no. 93-A-124), McKeown, September 31, 1993. Reported: *Adaros-Serrano v. Canada (Minister of Employment and Immigration)* (1993), 22 Imm. L.R. (2d) 31 (F.C.T.D.), at 38, where the Court directed the CRDD to consider (at the rehearing of the claim) the fact that the claimant suffers from a post-traumatic stress

Evidence—usually in the form of a medical report or psychological assessment—of present psychological and emotional suffering can be used to demonstrate that the claimant continues to suffer the effects of past persecution.[51]

The Trial Division has also held that the Refugee Division may take into account the experiences of family members in its assessment of "compelling reasons."[52] The subsistence of certain attitudes among the general population is not a necessary condition for the application of the provision.[53] Nor does a brief return to the country of alleged persecution necessarily preclude its application.[54]

7.2.3.1. Summary of the State of the Case Law

Accorting to one line of authority, there is both an objective component (i.e. the nature and severity of the claimant's experiences) and a subjective component (i.e. the continued effect or trauma of those experiences on the claimant's emotional or psychological well-being) that need to be looked at. (These two components required to establish "compelling reasons" do <u>not</u> coincide with the two elements of "well-founded fear of persecution", i.e. subjective fear and objective basis, neither of which are a requirement for the "compelling reasons" exception to be triggered.)

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disorder. In *Hinson, Jane Magnanang v. M.C.I.* (F.C.T.D., no. IMM-5034-94), Richard, July 18, 1996, the Court stated at 5-6: "The criteria to be considered are the psychological and emotional states of the claimant both at the time of the persecution and at the present time as a result of the persecution." It then directed the CRDD to consider "the negative or psychological effects of past persecution as well as present psychological and emotional suffering as a result of past persecution."

[51] *Adaros-Serrano, ibid.*, referring to post-traumatic stress disorder. In *Hinson, supra,* footnote 50, the Court held that it was improper to draw an adverse inference from the fact that the claimant delayed in obtaining a medical report, especially when the report in question diagnosed post-traumatic stress syndrome; nor does a delay in seeking psychological treatment in such a case mean that there was no adverse psychological effect.

[52] *Arguello-Garcia, supra,* footnote 49. See also *Velasquez, Ana Getrudiz v. M.E.I.* (F.C.T.D., no. IMM-990-93), Gibson, March 31, 1994, where the Court stated, in *obiter*, that a finding of "compelling reasons" may be based on the persecution inflicted on a family member (spouse); and *Yang, Yi Lan v. M.E.I.* (F.C.T.D., no. 93-A-135), Nadon, February 2, 1994. In *Bhardwaj, Shanti Parkash v. M.C.I.* (F.C.T.D., no. IMM-240-98), Campbell, July 27, 1998. Reported: *Bhardwaj v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm. L.R. (2d) 192 (F.C.T.D.), the CRDD applied section 2(3) to the eldest daughter of a family of claimants because she was profoundly affected by witnessing the shooting of her mother, but denied the other claims, including the mother's. The Court found that the CRDD disregarded psychiatric evidence regarding the effect of the incident on the mother.

[53] *Shahid, supra,* footnote 33, at 138. This is so notwithstanding the following passage in paragraph 136 of the UNHCR *Handbook*: "It is frequently recognized that a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of régime in his country, this may not always produce a complete change in the attitude of the population, nor in view of his past experiences, in the mind of the refugee."

[54] In *Aragon, Luis Roberto v. M.E.I.* (F.C.T.D., no. IMM-4632-93), Nadon, August 12, 1994, the Court held that the CRDD had not properly considered the circumstances surrounding the claimant's return to El Salvador (namely, to see his mother). The torture he experienced had also occurred during an earlier visit, but this too was held not to be a bar to invoking section 2(3).

Summarizing the state of the case law in *Shahid*,[55] Mr. Justice Noël of the Trial Division stated:

> In *Arguello-Garcia*...McKeown J. established the following test for the application of subs. 2(3):
>
> (1) The claimant must have suffered from "atrocious" or "appalling" acts of persecution in the country from which he or she is claiming asylum;
>
> (2) The claimant must have a subjective fear of persecution such that he refuses to return to his country of origin and asks for the protection of the authorities of that country;
>
> [Note: This statement may be incorrect in that the Court in *Arguello-Garcia* did not explicitly require the claimant to demonstrate an ongoing subjective fear of persecution.]
>
> (3) The claimant must suffer continuing psychological after-effects of the previous persecution.
>
> ... The board, once it embarked upon the assessment of the...claim under subs. 2(3), had the duty to consider the level of atrocity of the acts inflicted upon the [claimant], the repercussions upon his physical and mental state, and determine whether this experience alone constituted a compelling reason not to return him to his country of origin.

However, there is also another line of authority that rejects the requirement of continuing psychological after-effects of previous persecution. In *Jiminez*,[56] Mr. Justice Rouleau challenged Mr. Justice Noël's *obiter* interpretation, as set out in *Shahid*, of the Trial Division decision of *Arguello-Garcia*. In particular, Mr. Justice Rouleau found that the jurisprudence does not support that there is a further test of continuing psychological after-effects which the claimant has to establish, once there is evidence of his or her having suffered "atrocious" or "appalling" acts of persecution.

Even for the latter line of authority, however, it would appear that while there is no test or requirement of continuing psychological after-effects, the existence of such a condition would still be relevant to an assessment of—and supportive of—"compelling reasons".

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[55] *Shahid, supra*, footnote 33, at 136 and 138. The statement of the law set out in *Shahid* continues to be followed by some Justices of the Federal Court. See, for example, *Kazi, supra*, footnote 17, where it was not shown that the claimant suffered "continuing psychological after-effects of the previous persecution"; and *Mongo, Parfait v. M.C.I.* (F.C.T.D., no. IMM-1005-98), May 6, 1999.

[56] *Jiminez, Wilfredo v. M.C.I.* (F.C.T.D., no. IMM-1718-98), Rouleau, January 25, 1999. Relying on the evidence presented, the CRDD had concluded that the claimant's psychological state at the time of the hearing was premised on the severe brain injury he had suffered in Canada and possibly on contributing factors such as alcohol and drugs, and that, therefore, "there was insufficient evidence upon which to base a finding that the [claimant's] experience of persecution in El Salvador was so exceptional that it causes ongoing suffering of the order experienced by the applicant in *Arguello-Garcia*." The Court found that the CRDD had erred in its approach and remitted the case back for a determination whether or not the claimant's experiences in El Salvador alone met the exceptional circumstances envisioned by section 2(3) of the Act.

7.3. *SUR PLACE* CLAIMS

A claimant may be a refugee as a consequence of events which have occurred in his or her home country since departure,[57] or a significant intensification of pre-existing factors since departure from his or her country.[58] Claims may also be advanced based, in whole or part, on the activities of the claimant since leaving his or her country.[59]

In *Biakona,*[60] however, the Court expressed the (unusual) view that "a refugee claimant cannot use as a reason for his or her fear of returning to his or her country of citizenship, the fact that while in Canada they were very active politically and thus should not be returned to his or her country of citizenship."

7.3.1. Claimant's Activities Abroad

According to paragraph 96 of the UNHCR *Handbook*, the key issues in cases based on the claimant's activities since leaving his or her home country are "whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities." Even though a claimant's actions subsequent to departure may have come to the attention of the authorities there, it may nevertheless be that, in the circumstances, those actions do not make for a well-founded fear of persecution.[61]

Where claims are based on the claimant's activities abroad, some decisions of the Trial Division have focused on the issue of the *bona fides* or motivation of the claimant and have found that the claimant did not have a subjective fear of persecution.[62]

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[57] *Chaudri, Tahir Ahmad Nawaz v. M.E.I.* (F.C.A., no. A-1278-84), Thurlow, Hugessen, McQuaid, June 5, 1986. Reported: *Chaudri v. Canada (Minister of Employment and Immigration)* (1986), 69 N.R. 114 (F.C.A.); *Diallo, Abdou Salam v. M.C.I.* (F.C.T.D., no. A-1157-92), Noël, June 8, 1995.

[58] *Ghazizadeh, Reza v. M.E.I.* (F.C.A., no. A-393-90), Hugessen, MacGuigan, Décary, May 17, 1993. Reported: *Ghazizadeh v. Canada (Minister of Employment and Immigration)* (1993), 154 N.R. 236 (F.C.A.).

[59] *Urur, Mohamed Ahmed v. M.E.I.* (F.C.A., no. A-228-87), Pratte, Joyal, Walsh, January 15, 1988; *Chen, Kang v. S.G.C.* (F.C.T.D., no. A-1176-91), Gibson, August 6, 1993; *Ali, Ismail Farah v. M.E.I.* (F.C.T.D., no. A-1095-92), Noël, November 2, 1993; *Vasuthevan, Nagamany v. M.E.I.* (F.C.T.D., no. IMM-887-93), Jerome, March 23, 1994. In *Cai, Heng Ye v. M.C.I.* (F.C.T.D., no. IMM-1088-96), Teitelbaum, May 16, 1997, the Court underlined the importance of considering the claimant's activities both in the home country and abroad in combination.

[60] *Biakona, supra,* footnote 49. On the other hand, in *Manzila, Nicolas v. M.C.I.* (F.C.T.D., no. IMM-4757-97), Hugessen, September 22, 1998, and in other cases, the Court held that the CRDD is required to consider the claimant's activities abroad even when it disbelieves the account of experiences in the home country.

[61] *Vafaei, Farah Angiz v. M.E.I.* (F.C.T.D., no. IMM-1276-93), Nadon, February 2, 1994, which referred specifically to paragraph 96 of the UNHCR *Handbook*. See also *André, Marie-Kettelie v. M.E.I.* (F.C.T.D., no. A-1444-92), Dubé, October 24, 1994, where the CRDD found that the claimant's participation in a large pro-Aristide demonstration in Montreal was not likely to cause her problems in Haiti.

[62] *Said, Mohamed Ahmed v. M.E.I.* (F.C.T.D., no. 90-T-638), Teitelbaum, May 1, 1990, where the claimant continued to demonstrate against the Kenyan government after he had been ordered excluded from Canada; *Herrera, Juan Blas Perez de Corcho v. M.E.I.* (F.C.T.D., no. A-615-92), Noël, October 19, 1993, where the claimant spoke out against the Cuban regime after claiming refugee status in Canada.

On the other hand, in *Ngongo,*[63] the Court cited with approval the following passage from Professor Hathaway's *The Law of Refugee Status:*

> It does not follow, however, that all persons whose activities abroad are not genuinely demonstrative of oppositional political opinion are outside the refugee definition. Even when it is evident that the voluntary statement or action was fraudulent in that it was prompted primarily by an intention to secure asylum, the consequential imputation to the claimant of a negative political opinion by authorities in her home state may nonetheless bring her within the scope of the Convention definition. Since refugee law is fundamentally concerned with the provision of protection against unconscionable state action, an assessment should be made of any potential harm to be faced upon return because of the fact of the non-genuine political activity engaged in while abroad.[64]

Evidence of political activities in Canada should be considered by the panel whether the claimant specifically raises a *sur place* claim or not.[65]

7.3.2. Changes in Country Conditions or Claimant's Personal Circumstances

The fact that the claimant's departure from his or her homeland may have been perfectly legal is not relevant when considering a *sur place* possibility. What is required is an assessment of the situation in the homeland after the claimant left it.[66]

In *Makala,*[67] the Court considered the applicability of paragraph 82 of the UNHCR *Handbook,* which states:

> There may, however, also be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reason of political opinion.

The Court found that the CRDD's erroneous finding that the claimant was not politically involved while in Congo may have impacted on its appreciation of the strength of the claimant's political convictions and potential actions against the government upon return to Congo.

In *Nthoubanza,*[68] on the other hand, the Court upheld the CRDD's finding that there was no evidence that the claimant would reasonably be likely to become a human rights activist or to

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[63] *Ngongo, Ndjadi Denis v. M.C.I.* (F.C.T.D., no. IMM-6717-98), October 25, 1999.

[64] Hathaway, *The Law of Refugee Status,* at page 39.

[65] *Moradi, Ahmad v. M.C.I.* (F.C.T.D., no. IMM-2317-97), MacKay, September 23, 1998.

[66] *Ghazizadeh, supra,* footnote 58, at 1-2 (unreported).

[67] *Makala, François v. M.C.I.* (F.C.T.D., no. IMM-300-98), Teitelbaum, July 17, 1998. Reported: *Makala v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm. L.R. (2d) 251 (F.C.T.D.).

express his political opinion if he returned to his country, given that he had not been a human rights or political activist under the previous regime.

A claimant may become a refugee *sur place* by virtue of the actions of Canadian authorities in that person's home country.[69]

[68] *Nthoubanza, Arthur Jholy v. M.C.I.* (F.C.T.D., no. IMM-207-98), Denault, December 17, 1998.

[69] In *M.C.I. v. Asaolu, Daniel Oluwafemi* (F.C.T.D., no. IMM-237-98), Campbell, July 31, 1998. Reported: *Canada (Minister of Citizenship and Immigration) v. Asaolu* (1998), 45 Imm. L.R. (2d) 190 (F.C.T.D.) Canadian immigration authorities sent the claimant's story and photograph to a Canadian visa officer in Nigeria to facilitate an investigation of his claim of persecution. In that case, the Court considered paragraphs 94-96 of the *UNHCR Handbook*. In *Mutamba, Phydellis v. M.C.I.* (F.C.T.D., no. IMM-2868-98), Pinard, April 15, 1999, Canadian authorities in Nairobi and Harare made inquiries of the Zimbabwean government with respect to the claimant's passport application in that country.

CHAPTER 7

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CHAPTER 8

8. INTERNAL FLIGHT ALTERNATIVE (IFA)[1]

8.1. GENERALLY

The question of whether an IFA exists is an integral part of the Convention refugee definition.[2] It arises when a claimant who otherwise meets all the elements of the Convention refugee definition in his or her home area of the country nevertheless is not a Convention refugee because the person has an IFA elsewhere in that country. The key concepts concerning IFA come from two cases: *Rasaratnam*[3] and *Thirunavukkarasu*.[4] From these cases it is clear that the test to be applied in determining whether there is an IFA is two-pronged. Both prongs must be satisfied in order for there to be a finding that the claimant has an IFA.

The Court of Appeal in *Kanagaratnam*,[5] was of the view that the determination of whether a claimant has a well-founded fear of persecution in his or her home area of the country is not a prerequisite to the consideration of an IFA.

In an earlier decision,[6] the Trial Division considered the issue of the relationship between IFA and change of circumstances and the applicability of "compelling reasons" (section 2(3) of the *Immigration Act*), and concluded that where an IFA applies to a claimant, that person is not and never could have been a Convention refugee. Accordingly, he or she could not cease to be a Convention refugee and section 2(3) would not apply as this section applies only where the determination of the claim is made, in whole or in part, on the basis of a change of circumstances.

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1 See also *Commentary on Internal Flight Alternative*, IRB Legal Service, April 1994 (but note that this paper has not been updated since April 1994).

2 *Rasaratnam* v. *Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.), at 710.

3 *Rasaratnam, ibid.*

4 *Thirunavukkarasu* v. *Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (C.A.).

5 *Kanagaratnam, Parameswary* v. *M.E.I.* (F.C.A., no. A-356-94), Strayer, Linden, McDonald, January 17, 1996. Reported: *Kanagaratnam* v. *Canada (Minister of Employment and Immigration)* (1996), 36 Imm. L.R. (2d) 180 (F.C.A.); *Arunachalam, Sinnathamby* v. *M.C.I.* (F.C.T.D., no. IMM-157-96), MacKay, August 14, 1996. A finding of an IFA implicitly concedes a well-founded fear of persecution elsewhere in the country.

6 *Singh, Gurmeet* v. *M.C.I.* (F.C.T.D., no. IMM-75-95), Richard, July 4, 1995. Reported: *Singh, (Gurmeet) v. Canada (Minister of Citizenship and Immigration)* (1995), 30 Imm. L.R. (2d) 226 (F.C.T.D.), at 4. See also, *Sangha, Karamjit Singh* v. *M.C.I.* (F.C.T.D., no. IMM-1555-98), Reed, October 28, 1998.

8.2. TWO-PRONGED TEST

(1) "... the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists."[7]

(2) Moreover, conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for him to seek refuge there.[8]

This latter statement was elaborated on in *Thirunavukkarasu*[9]. The test is an objective one: is it objectively reasonable to expect the claimant to seek safety in a different part of the country? Another way of stating the question is: would it be unduly harsh to expect the claimant to move to another, less hostile part of the country before seeking refugee status abroad? An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or staying there (see point (g) in section 8.4.2., below). However, it is not enough for the claimant to say that he or she does not like the weather there, or that he or she has no friends or relatives there, or that he or she may not be able to find suitable work there (but see point (f) in section 8.4.1).

Many factors can be considered in coming to a decision on whether an IFA may be "unduly harsh". In *Ramanathan,*[10] the Court stated: "A test of whether an IFA is unreasonable or unduly harsh in all the circumstances is bound to involve the consideration of some factors, at least, which will undoubtedly be the same sort of considerations that are taken into account in humanitarian and compassionate relief." Similarly, in *Jayabalasingham,*[11] the Court found that when the CRDD stated that the test for reasonableness of the IFA requires "some additional or extraordinary hardship" it had erred by bringing the threshold of the test beyond humanitarian and compassionate considerations.

8.3. NOTICE - BURDEN OF PROOF

Two other general principles that emerge from *Rasaratnam* and *Thirunavukkarasu* concern notice and burden of proof. With respect to notice, the issue of IFA must be raised by the Refugee Claims Officer, the panel or the Minister (before or during the hearing). Extensive questioning during the hearing on the subject of IFA can be sufficient notice.[12] With respect to

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[7] *Rasaratnam, supra*, footnote *2* at 710.

[8] *Rasaratnam, ibid.*, at 709 and 711.

[9] *Thirunavukkarasu, supra*, footnote 4, at 596-599.

[10] *Ramanathan, Vairamuthu* v. *M.C.I.* (F.C.T.D., no. IMM-5091-97), Hugessen, August 19, 1998.

[11] *Jayabalasingham, Thilagavathy* v. *M.C.I.* (F.C.T.D., no. IMM-140-98), Richard, October 27, 1998.

[12] *Hasnain, Khalid* v. *M.C.I.* (F.C.T.D., no. A-962-92), McKeown, December 14, 1995. There is some debate as to how specific the notice of the region being considered as an IFA must be: in *Rabbani, Sayed Moheyudee* v. *M.C.I.* (F.C.T.D., no. IMM-236-96), Noël, January 16, 1997, the Court said that the CRDD must identify a specific geographic location; but in *Singh, Ranjit* v. *M.C.I.* (F.C.T.D., no. A-605-92), Reed, July 23, 1996, the

burden of proof, once the issue is raised, the onus is on the claimant to show that he or she does not have an IFA.

Even though the burden of proof rests upon the claimant, the Board cannot base a finding that there is an IFA, in the absence of sufficient evidence, solely on the basis that the claimant has not fulfilled the onus of proof. [13]

There is some debate as to whether a specific location or region must be identified as the potential IFA.[14]

8.4. INTERPRETATION AND APPLICATION OF THE TWO-PRONGED TEST

The abundance of case law on the topic of IFA basically concerns the interpretation and application of the two pronged test. Some factors are relevant to both prongs of the test, some are relevant to one or the other prong. Recently, the Trial Division has specifically addressed the issue of at what point in time IFA is to be considered.[15]

8.4.1. Fear of Persecution

On the issue of whether there is a serious possibility of persecution in the potential IFA, the considerations are basically the same as when making this determination with respect to the claimant's home area of the country. However, there are some specific points concerning this issue and IFA that are noteworthy:

(a) In determining whether there is an objective basis for fearing persecution in the IFA, the Refugee Division must consider the personal circumstances of the claimant, and not just general evidence concerning other persons who live there.[16]

Court rejected the claimant's argument that the CRDD should identify a place within the country as an IFA, especially in a country as large as India. *Vidal, Daniel Fernando* v. *M.E.I.* (F.C.T.D., no. A-644-92), Gibson, May 15, 1997 no notice was given at outset of hearing, but counsel presented evidence on IFA. Court found no prejudice suffered by the claimant as a result of the failure to give notice.

[13] *Chauhdry, Mukhtar Ahmed* v. *M.C.I.* (F.C.T.D., no. IMM-3951-97), Wetston, August 17, 1998.

[14] *Rabbani* (footnote 12, page 8-3); and *Singh, Ranjit* (footnote 12, page 8-3). Similarly, in *Gosal, Pardeep Singh* v. *M.C.I.* (F.C.T.D., no. IMM-2316-97), Reed, March 11, 1998, the Court found that one need not identify a specific location within the country for an IFA analysis. *Rabbani* was distinguished on its facts as in that case the country concerned was Afghanistan and control over areas considered safe tended to shift.

[15] *Dubravac, Petar* v. *M.C.I.* (F.C.T.D., no. IMM-839-94), Rothstein, February 1, 1995. Reported: *Dubravac v. Canada (Minister of Citizenship and Immigration)* (1995), 29 Imm. L.R. (2d) 55 (F.C.T.D.)., where the claimant's hometown had been surrounded by opposing Serbian forces, the Court commented that they "would not be required to go from their hometown to the safe zone of Croatia, but ... from wherever they were relanded upon being sent back."

[16] See for example: *Abubakar, Fahmey Abdalla Ali* v. *M.E.I.* (F.C.T.D., no. A-572-92), Wetston, September 9, 1993, at 3-5; *Pathmakanthan, Indradevi* v. *M.E.I.* (F.C.T.D., no. IMM-2367-93), Denault, November 2, 1993. Reported: *Pathmakanthan* v. *Canada (Minister of Employment and Immigration)* (1993), 23 Imm. L.R. (2d) 76 (F.C.T.D.), at 79-80; *Kaler, Minder Singh* v. *M.E.I.* (F.C.T.D., no. IMM-794-93), Cullen, February 3, 1994, at 9; *Dhillon, Harbhagwant Singh* v. *S.S.C* (F.C.T.D., no. IMM-3256-93), Rouleau, March 17, 1994, at 3;

(b) The Refugee Division must consider the circumstances of those persons in the IFA who are situated similarly to the claimant.[17]

(c) In assessing the particular circumstances of the claimant, the Refugee Division may consider the condition of family members who have sought refuge in the IFA.[18]

(d) The nature and the agents of the persecution feared ought to suggest that the persecution would be confined to particular areas of the country.[19] The fact, however, that the agents of persecution are the central authority in the country does not prevent a finding that there is an IFA.[20]

Jeyachandran, Senthan v. *S.G.C.* (F.C.T.D., no. IMM-799-94), McKeown, March 30, 1995; *Ratnam, Selvanayagam* v. *M.C.I.* (F.C.T.D., no. IMM-1881-94), Richard, March 31, 1995.

[17] *Kahlon, Hari Singh* v. *S.G.C* (F.C.T.D., no. IMM-532-93), Gibson, August 5, 1993. Reported: *Kahlon* v. *Canada (Solicitor General),* (1993), 24 Imm. L.R. (2d) 219 (F.C.T.D.), at 222-224; *Manoharan, Vanajah* v. *M.E.I.* (F.C.T.D., no. A-1156-92), Rouleau, December 6, 1993, at 7-8; *Naguleswaran, Pathmasilosini (Naguleswaran)* v. *M.C.I.* (F.C.T.D., no. IMM-1116-94), Muldoon, April 19, 1995, at 6 (however, caution is suggested concerning interpretation of the phrase, "...solid proof of personal persecution (either individually or collectively)..." given case law indicating there is no need for past persecution, individually or collectively, e.g. see *Salibian* v. *Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 (C.A.)).

[18] See for example *Ali, Chaudhary Liaqat* v. *M.E.I.* (F.C.T.D., no. A-1461-92), Noël, January 20, 1994, at 5-6.

[19] *Ahmed, Ali* v. *M.E.I.* (F.C.A., no. A-89-92), Marceau, Desjardins, Décary, July 14, 1993. Reported: *Ahmed v. Canada (Minister of Employment and Immigration)* (1993), 156 N.R. 221 (F.C.A.), at 223-224. See also for example: *M.E.I.* v. *Sharbdeen, Mohammed Faroudeen* (F.C.A., no. A-488-93), Mahoney, MacGuigan, Linden, March 21, 1994. Reported: *Canada (Minister of Employment and Immigration)* v. *Sharbdeen* (1994), 23 Imm. L.R. (2d) 300 (F.C.A.) (although this issue appears to be considered under reasonableness); *Nadarajah, Sivasothy Nathan* v. *M.E.I.* (F.C.T.D., no. IMM-4215-93), Simpson, July 26, 1994; *Randhawa, Faheem Anwar* v. *S.G.C.* (F.C.T.D., no. IMM-5621-93), Rouleau, August 12, 1994; *Zetino, Rudys Francisco Mendoza* v. *M.C.I.* (F.C.T.D., no. IMM-6173-93), Cullen, October 13, 1994. Reported: *Zetino* v. *Canada (Minister of Citizenship and Immigration)* (1994), 25 Imm. L.R. (2d) 300 (F.C.T.D.) (although this issue may be considered under reasonableness).

[20] *Saini, Makhan Singh* v. *M.E.I.* (F.C.A., no. A-750-91), Mahoney, Stone, Linden, March 22, 1993. Reported: *Saini* v. *Canada (Minister of Employment and Immigration)* (1993), 151 N.R. 239 (F.C.A.), leave to appeal to the S.C.C. denied: *Saini* v. *M.E.I.* (S.C.C., no. 23619), Lamer, McLachlin, Major), August 12, 1993. Reported: *Saini* v. *Canada (Minister of Employment and Immigration)* (1993), 158 N.R. 300 (S.C.). See also for example: *Sidhu, Jadgish Singh* v. *M.E.I.* (F.C.T.D., no. 92-A-6540), Muldoon, May 31, 1993; *Badesha, Jagir Singh* v. *S.S.C.* (F.C.T.D., no. A-1544-92), Wetston, January 19, 1994. Reported: *Badesha* v. *Canada (Secretary of State)* (1994), 23 Imm. L.R. (2d) 190 (F.C.T.D.); *Uppal, Jatinder Singh* v. *S.S.C.* (F.C.T.D., no. A-17-93), Wetston, January 19, 1994, affirmed: *Uppal, Jatinder Singh* v. *M.C.I.* (F.C.A., no. A-42-94), Isaac, Hugessen, Décary, November 1, 1994; *Kaler, supra,* footnote 16, at 9; *Karthikesu, Cumariah v. M.E.I.* (F.C.T.D., no. IMM-2998-93), Strayer, May 26, 1994; *Guraya, Balihar Singh* v. *S.S.C.* (F.C.T.D., no. IMM-4058-93), Pinard, July 8, 1994; *Balasubramaniam, Veergathy* v. *M.C.I.* (F.C.T.D., no. IMM-1902-93), McKeown, October 4, 1994; *Dhillon, Inderjit Kaur* v. *M.C.I.* (F.C.T.D., no. IMM-2652-94), McKeown, February 1, 1995.

Saini has been distinguished in *Singh, Sucha* v. *M.E.I.* (F.C.T.D., no. 93-A-91), Dubé, June 23, 1993, where the Court held that the CRDD's conclusion that an IFA existed because there was not a nation-wide campaign against the claimant's ethnic group did not satisfy the criteria for finding an IFA as established in *Rasaratnam, supra,* footnote 2.

(e) If an individual had to remain in hiding to avoid problems, this would not be evidence of an IFA.[21]

(f) According to the Trial Division, the presence of close relatives in the putative IFA, and the duration of previous residence and past employment there, may have a bearing on "whether or not it is 'objectively reasonable' for the claimant to live in ... [the IFA] without fear of persecution", rather than being matters merely of personal comfort or convenience.[22]

(g) There is some lack of clarity concerning how the concept of cumulative harassment or cumulative grounds applies in the consideration of IFA.[23] In *Karthikesu*, the Court appears to find that experiences in the non-IFA area do not form part of a cumulative assessment when considering the IFA area. In *Balasubramaniam*, however, the Court suggests that depending on the CRDD's other findings "... it [the CRDD] may or may not have to consider the question of the cumulative effect of all the incidents that occurred to the applicant at the hands of the Sri Lankan armed forces to determine whether these, together with the likelihood of continuing harassment at the hands of the authorities, might constitute persecution on a cumulative basis."(emphasis added). This statement seems to suggest that experiences in the non-IFA area can form part of a cumulative assessment when considering the IFA area.

(h) Large urban areas cannot be assumed to be an IFA by virtue of their population size alone.[24]

(i) A determination regarding nexus is equally important in the assessment of whether an IFA exists in a given case.[25]

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[21] See for example: *Sabaratnam, Thavakaran* v. *M.E.I.* (F.C.A., no. A-536-90), Mahoney, Stone, Robertson, October 2, 1992; *Fernando, Joseph Stanley* v. *M.E.I.* (F.C.T.D., no. 92-A-6986), McKeown, May 19, 1993, at 1; *Pathmakanthan, supra*, footnote 16, at 4; *Sundralingam, Chandrakala* v. *M.C.I.* (F.C.T.D., no. IMM-6218-93), Cullen, September 20, 1994, at 6-7; *Kachine, Serguei* v. *M.C.I.* (F.C.T.D., no. IMM-1144-94), Noël, February 7, 1995.

[22] *Kulanthavelu, Gnanasegaram* v. *M.E.I.* (F.C.T.D., no. IMM-57-93), Gibson, December 3, 1993, at 5-6.

[23] *Karthikesu, supra,* footnote 20; *Balasubramaniam, supra*, footnote 20.

[24] *Reynoso, Edith Isabel Guardian* v. *M.C.I.* (F.C.T.D., no. IMM-2110-94), Muldoon, January 29, 1996; *Sanno, Aminata* v. *M.C.I.* (F.C.T.D., no. IMM-2124-95), Tremblay-Lamer, April 25, 1996.

[25] In *Gomez, Mario Alonso Martinez v. M.C.I.* (F.C.T.D., no. IMM-5501-97), Teitelbaum, December 11, 1998, the CRDD found that the claimant had a well-founded fear of persecution in Puerto Vallarta because of the illegal actions of the police in brutalizing him, rather than because of his membership in a particular social group as a result of his homosexuality. In allowing the application for judicial review, the Court highlighted the fact that, in determining the availability of an IFA, the tribunal must first link the claimant's claim to one of the enumerated grounds in the definition of a Convention refugee.

8.4.2. Reasonable in All the Circumstances

Regarding the issue of "reasonable in all the circumstances", the Court of Appeal has stated that the circumstances must be relevant to the IFA question: They cannot be catalogued in the abstract. They will vary from case to case."[26] However, whether certain factors are relevant to the determination of whether a given IFA would be "objectively reasonable" is an issue that transcends the particular facts of a given case. Therefore, the appropriate standard of review is "correctness" in cases where the issue is what factors the CRDD considers in assessing an IFA.[27] The Federal Court, however, has provided the following general guidance:

(a) The test is a flexible one that takes into account the particular situation of the claimant and the particular country involved.[28] The evidence, before the Refugee Division, of circumstances in the IFA must be more than general information and must be relevant to the claimant's specific circumstances.[29]

(b) There must be some discussion of the regional conditions which would make an IFA reasonable.[30]

(c) The presence or absence of family in the IFA is a factor in assessing reasonableness,[31] especially in the case of minor claimants.[32]

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[26] *Sharbdeen, supra*, footnote 19, at 301-2.

[27] *Ranganathan* v. *Canada* [1999] 4 CF 269, Evans, May 21, 1999.

[28] See for example: *Thirunavukkarasu, supra*, footnote 4, at 597; *Rasaratnam, supra*, footnote 2, at 711; *Fernando, supra*, footnote 21, at 1; *Abubcakar, supra*, footnote 16, at 4-5; *Megag, Sahra Abdilahi* v. *M.E.I.* (F.C.T.D., no. A-822-92), Rothstein, December 10, 1993, at 3; *Chkiaou, Dimitri* v. *M.C.I.* (F.C.T.D., no.IMM-266-94), Cullen, March 7, 1995, and *Sanno, supra*, footnote 24, at 5-8. In *Yoganathan, Kandasamy* v. *M.C.I.* (F.C.T.D., no. IMM-3588-97), Gibson, April 20, 1998, the Court noted that, in assessing the reasonableness of the IFA, the CRDD must look at the personal circumstances of the claimant and it is insufficient to simply assess whether the claimant fits the "most at risk profile."

[29] See for example: *Singh, Sucha, supra*, footnote *20*; *Kahlon*; *supra*, footnote 17; *Dhaliwal, Jasbir Singh* v. *M.E.I.* (F.C.T.D., no. 93-A-364), MacKay, August 9, 1993; *Singh, Swarn* v. *M.E.I.* (F.C.T.D., no. A-1409-92), Rothstein, May 4, 1994. *Thevasagayam, Ebenezer Thevaraj* v. *M.C.I.* (F.C.T.D., no. IMM-252-97), Tremblay-Lamer, October 23, 1997, evidence of past dentention and torture of claimant in relation to a Colombo bombing casts doubt on reasonableness of IFA; *Premanathan, Gopalasamy* v. *M.C.I.* (F.C.T.D., no. IMM-4423-96), Simpson, August 29, 1997, random roundups and routine reporting requirements do not make IFA unreasonable; *Kaillyapillai, Srivasan* v. *M.C.I.* (F.C.T.D., no. IMM-1263-96), Richard, February 27, 1997, where Court found no IFA in Colombo for a claimant who had been arrested, beaten and released and told to leave Colombo.

[30] See for example: *Keerthaponrajah, Alfred* v. *M.E.I.* (F.C.T.D., no. 92-A-7282), Noël, June 23, 1993, at 3; *Suthanthirarajah, Ratnam* v. *M.E.I.* (F.C.T.D., no. 92-A-6902), Noël, June 22, 1993. Reported: *Suthanthirarajah* v. *Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 269 (F.C.T.D.); *Geelle, Abdirisak Duale* v. *M.E.I.* (F.C.T.D., no. A-918-92), Rouleau, July 30, 1993. Reported: *Geelle* v. *Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 36 (F.C.T.D.); *Ibrahim, Ahmed Mohamed* v. *M.E.I.* (F.C.T.D., no. A-884-92), Jerome, March 8, 1994; *Isa, Sharmarka Ahmed* v. *S.S.C.* (F.C.T.D., no. IMM-1760-94), Reed, February 16, 1995. Reported: *Isa* v. *Canada (Secretary of State)* (1995), 28 Imm. L.R. (2d) 68 (F.C.T.D.)., at 5-6. *Ganeshan, Annam* v. *M.C.I.* (F.C.T.D., no. IMM-1440-96), MacKay, February 21, 1997, it was appropriate for panel to consider social services available and existence of NGOs that support women.

(d) A destroyed infrastructure and economy in the IFA, and the stability or instability of the government that is in place there, are relevant factors.[33] Instability alone is not the test of reasonableness,[34] nor is a disintegrating infrastructure.[35]

(e) An IFA is not reasonable if it requires the perpetuation of human rights abuses.[36]

(f) Hardship in accessing the IFA must be assessed.[37]

(g) There is no onus on a claimant to personally test the viability of an IFA before seeking protection in Canada.[38]

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[31] *Ranganathan, supra,* footnote 27: The Court stated it was settled law that in determining undue hardship or unreasonableness the Refugee Division must take into account the fact that the claimant has no relatives in the IFA when there are family members in Canada.

The Court in *Ramanathan, supra,* footnote 10, considered the presence of family in Canada in assessing the reasonableness of an IFA in Colombo. Similarly, in *Sooriyakumaran, Pathmalosany* v. *M.C.I.* (F.C.T.D., no. IMM-4099-97), Lutfy, October 1, 1998, the Court found that the presence of the claimant's two minor children in Canada was a "human factor" to be considered in evaluating the reasonableness of the IFA.

In *Hashi, Haweya Abdinur* v. *M.C.I.* (F.C.T.D., no. IMM-2597-96), Muldoon, July 31, 1997, a young Somali woman without family was found to have an IFA as she could access help from her clan; however, in *Dirshe (*see footnote 35*)*, it was found that an IFA among clanspeople for a Somali woman without family was unreasonable as there is evidence that women need strong family support for adequate protection from violence.

[32] The absence of family in an IFA is relevant to determining the unreasonableness of requiring a child to live there. *Elmi, Mahamud Hussein* v. *M.E.I.* (F.C.T.D., no. IMM-580-98), McKeown, March 12, 1999. Similarly, in *Hassan, Liban* v. *M.E.I.* (F.C.T.D., no. IMM-3634-98), Campbell, April 14, 1999, the Court found that in the case of a minor, an IFA cannot be reasonable unless proper settlement arrangements are made.

[33] *Farrah, Sahra Said* v. *M.E.I.* (F.C.T.D., no. A-694-92), Reed, October 5, 1993, at 3. Regarding stability, see also *Tawfik, Taha Mohammed* v. *M.E.I.* (F.C.T.D., no. 93-A-311), MacKay, August 23, 1993. Reported: *Tawfik* v. *Canada (Minister of Employment and Immigration)* (1993), 26 Imm. L.R. (2d) 148 (F.C.T.D.).

[34] *Megag, supra,* footnote 28, at 3.

[35] *Rumb, Serge* v. *M.E.I.* (F.C.T.D., no. IMM-1481-98), Reed, February 12, 1999.

[36] *Mimica, Milanka* v. *M.C.I.* (F.C.T.D., no. IMM-3014-95), Rothstein, June 19, 1996, the claimant could only find accommodation in the IFA if current residents were expelled because of their ethnicity.

[37] In *Hashmat, Suhil* v. *M.C.I.* (F.C.T.D., no. IMM-2331-96), Teitelbaum, May 9, 1997, the claimant could only access the IFA in northern Afghanistan by going through the neighbouring state of Uzbekistan. The Court found it unreasonable for the panel to conclude, without any evidence, that the claimant would be allowed to cross the border. The Court also noted that the *Immigration Act* would not allow removal to a country that is not the claimant's country of birth, nationality or former residence. See also *Dirshe, Safi Mohamud* (F.C.T.D., no. IMM-2124-96), Cullen, July 2, 1997, where the Court noted that a real possibility of rape while trying to get to the IFA makes it an unreasonable option. In fact, in *Hashmat, supra,* the Court found there to be undue hardship in reaching the IFA because the claimant's wife and child, who were not claimants, would have to travel with him to reach the IFA and there was evidence of widespread rape of women and children making that journey.

[38] *Alvapillai, Ramasethu* v. *M.C.I.* (F.C.T.D., no. IMM-4226-97), Rothstein, August 14, 1998.

Dealing with specific cases, the Court has indicated it is appropriate for the CRDD to consider, in various ways, factors such as: the claimant's age,[39] appearance (including gender), religion, political profile,[40] the employment situation,[41] the type of residence available, the ability to speak the language, the ability to raise a family,[42] the crime rate, the physical and financial barriers,[43] the composition of the "family" unit (it appears this may also go to fear of persecution),[44] previous residence in the IFA area,[45] familiarity with the IFA area, the capacity of the claimant to re-establish him or herself,[46] whether there is a similar group located in the IFA area, race or ethnicity of the claimant (this may also go to fear of persecution),[47] having a registration card, being registered with the police,[48] ability to move from one residence to another (e.g. legal restrictions),[49] and the health and financial situation of the claimant.[50]

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[39] *Gabriel, Joseph Gnanpragasam* v. *M.E.I.* (F.C.T.D., no. IMM-3776-93), Wetston, May 25, 1994; *Krishnapillai, Arumugam* v. *M.C.I.* (F.C.T.D., no. IMM-5724-93), Reed, December 2, 1994; *Sahota, Amrik Singh* v. *M.E.I.* (F.C.T.D., no. IMM-3313-93), McKeown, June 3, 1994, the young age of the claimant was held to be a factor with respect to which the Convention on the Rights of the Child ought to be considered. See also *Osman, Yassin Yussuf* v. *M.C.I.* (F.C.T.D., no. IMM-1667-96), Campbell, April 9, 1997, where young age (17) of claimant should have been considered in assessing reasonableness of IFA where he had no close family; *Nithiananathan, Krishnapillai* v. *M.E.I.* (F.C.T.D., no. IMM-36-97), Muldoon, October 21, 1997, repeated bribery demands to get out of detention may make IFA unduly harsh for an elderly claimant living alone.

[40] *Aramburo, Juan Carlos* v. *M.C.I.* (F.C.T.D., no. IMM-6782-93), Cullen, December 7, 1994.

[41] *Aumbhagavan, Sivasubramaniam* v. *S.S.C.* (F.C.T.D., no. IMM-3619-93), Cullen, June 6, 1994; *Kandiah, Nagamma* v. *M.E.I.* (F.C.T.D., no. IMM-3100-93), McKeown, September 1, 1994; *Thanabalasingam, Jeyanthini* v. *S.S.C.* (F.C.T.D., no. IMM-206-94), Rothstein, October 17, 1994.

[42] *Javed, Mohammad* v. *M.C.I.* (F.C.T.D., no. IMM-446-94), Reed, July 20, 1994; *Pathmanathan, Ponnampalam* v. *M.C.I.* (F.C.T.D., no. IMM-233-94), McGillis, November 17, 1994.

[43] *Malik, Mohammed Azim* v. *M.E.I.* (F.C.T.D., no. IMM-58-93), McKeown, June 6, 1994.

[44] *Vyramuthu, Sanmugarajah* v. *S.G.C.* (F.C.T.D., no. IMM-6277-93), Rouleau, January 26, 1995, one of the family members was found not to have an IFA; *Nadesalingam, Mahalingam* v. *M.C.I.* (F.C.T.D., no. IMM-5711-93), Muldoon, December 13, 1994, a family with young children is more vulnerable in seeking an IFA.

[45] *Rasathurai, Sinnadurai* v. *M.E.I.* (F.C.T.D., no. IMM-4556-93, Denault, November 25, 1994; *Krishnapillai, Arumugam* v. *M.C.I.* (F.C.T.D., no. IMM-5724-93, Reed, December 2, 1994; *Hazime, Bassam Mohamed* v. *M.E.I.* (F.C.T.D., no. IMM-7223-93), McKeown, December 20, 1994. *Krishnakumar, Nalini* v. *M.C.I.* (F.C.T.D., no. IMM-1527-96), Joyal, July 7, 1997, a young mother with two children and a history of brief detentions and releases was held to have an IFA in Colombo.

[46] *Sivalingham, Tharini* v. *M.C.I.* (F.C.T.D., no. IMM-3440-93), MacKay, October 20, 1994; *Ayad, Larbi* v. *M.C.I.* (F.C.T.D., no. IMM-2820-95), Tremblay-Lamer, April 26, 1996.

[47] *Hasnain, supra,* footnote 12; *Somasundaram, Sivapackieswary* v. *M.C.I.* (F.C.T.D., no. IMM-6030-93), Cullen, September 21, 1994, the Court appears to consider under reasonableness such factors as extortion, threats, flight of all family members, concern regarding the police (although these issues are traditionally considered as going to persecution).

[48] *Capitansabapathy, Saraswathy* v. *M.C.I.* (F.C.T.D., no. IMM-973-94), Wetston, December 2, 1994.

[49] *Chkiaou, supra,* footnote 28.

[50] *Periyathamby, Thangamma* v. *M.C.I.* (F.C.T.D., no. IMM-6846-93), Rouleau, January 6, 1995. Reported: *Periyathamby v. Canada (Minister of Citizenship and Immigration)* (1995), 26 Imm. L.R. (2d) 179 (F.C.T.D).

Other factors identified by the Court as being relevant to a determination of this issue include the claimant's business and social contacts in the potential IFA area;[51] and medical and psychological reports that provide objective evidence that it would be "unduly harsh" to expect a claimant to move to a potential IFA area.[52]

[51] See for example: *Somasundaram, Pathmananathan* v. *M.C.I.* (F.C.T.D., no. IMM-432-95), MacKay, September 7, 1995, at 4.

[52] *Singh, Gurmeet, supra*, footnote 6, at 5. *Taher, Javaid v. M.C.I.* (F.C.T.D., no. IMM-265-98), Rothstein, November 25, 1998, *Cepeda-Guitierrez, Carlos Arturo v. M.C.I.* (F.C.T.D., no. IMM-596-98), Evans, October 6, 1998; *Brar, Jagjit Singh* (F.C.T.D., no. IMM-213-98), Rothstein, January 11, 1999.

CHAPTER 8

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CHAPTER 9

9. PARTICULAR SITUATIONS

9.1. INTRODUCTION

This Chapter explores situations where more than one element of the Convention refugee definition is involved. At issue is not only whether what the claimant faces is persecution, but also, whether there is a nexus to one of the Convention refugee grounds. The situations can be complex and difficult to analyze: the key is to identify what requirements are imposed by each element and to discern which circumstances in the situation go to which element.

9.2. CIVIL WAR OR OTHER PREVALENT CONFLICT

The core of the case law in this area consists of two decisions from the Court of Appeal. The first of these is *Salibian*,[1] which sets out four general principles:[2]

> It can be said in light of earlier decisions by this Court on claims to Convention refugee status that
>
> (1) the applicant does not have to show that he had himself been persecuted or would himself be persecuted in the future;[3]
>
> (2) the applicant can show that the fear he had resulted not from reprehensible acts committed or likely to be committed directly against him but from reprehensible acts committed or likely to be committed against members of a group to which he belonged;
>
> (3) a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or, even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition; and
>
> (4) the fear felt is that of a reasonable possibility that the applicant will be persecuted if he returns to his country of origin ….

The Court goes on to adopt the following description of the applicable law (provided by Professor Hathaway):[4]

---

1 *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 (C.A.).

2 *Salibian, ibid.*, at 258, per Décary J.A.

3 See also *Olearczyk, Helena v. M.E.I.* (F.C.A., no. A-335-88), Hugessen, MacGuigan, Pratte (dissenting), April 20, 1989. Reported: *Olearczyk v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 18 (F.C.A.).

4 *Salibian, supra*, footnote 1, at 259, per Décary, J.A.; Hathaway, James C., *The Law of Refugee Status*, (Toronto: Butterworths, 1991), page 97.

> In sum, while modern refugee law is concerned to recognize the protection needs of particular claimants, the best evidence that an individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin. In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm for which the state is accountable, and if that risk is grounded in their civil or political status, then she is properly considered to be a Convention refugee.

The second of the leading precedents is the very brief decision in *Rizkallah*,[5] where the Court of Appeal said:

> To succeed, refugee claimants must establish a link between themselves and persecution for a Convention reason. In other words, they must be targeted for persecution in some way, either personally or collectively.
>
> ... the evidence, as presented to us, falls short of establishing that Christians in the claimant's Lebanese village were collectively targeted in some way different from the general victims of the tragic and many-sided civil war.[6]

Since *Salibian* and *Rizkallah*, there have been several additional Federal Court rulings in cases involving civil war. Most of these subsequent decisions have emanated from the Trial Division; a number have cited, and purported to apply, *Salibian* and/or *Rizkallah*; none has taken issue with *Salibian* or *Rizkallah*. Neither expressly nor by implication do these later cases yield much in the way of additional, clear principles.

One further principle which has emerged is that a claimant's membership in one of the two groups involved in a two-sided conflict does not by itself establish that the claimant is a Convention refugee.[7]

---

[5] *Rizkallah, Bader Fouad v. M.E.I.* (F.C.A., no. A-606-90), Marceau, MacGuigan, Desjardins, May 6, 1992. Reported: *Rizkallah v. Canada (Minister of Employment and Immigration)* (1992), 156 N.R. 1 (F.C.A.).

[6] *Rizkallah, ibid.*, at 1-2, per MacGuigan J.A.

[7] *Abdulle, Sadia Mohamed v. M.E.I.* (F.C.T.D., no. A-1440-92), Nadon, September 16, 1993, at 4. See also: *Mohamed, Abdirizak Hassan v. M.E.I.* (F.C.A., no. A-180-91), Isaac, Linden, McDonald, April 28, 1994; *Hassan, Jamila Mahdi v. M.E.I.* (F.C.A., no. A-757-91), Isaac, Marceau, McDonald, August 25, 1994, at 4. Reported: *Hassan v. Canada (Minister of Employment and Immigration)* (1994), 174 N.R. 74 (F.C.A.); and *Farah, Abdul-Qadir v. M.C.I.* (F.C.T.D., no. A-428-92), Noël, January 31, 1995, at 4.

9.2.1. Two Approaches: Comparative and Non-Comparative[8]

9.2.1.1. Background

The case law seems to suggest that, in considering whether there is a nexus between the harm feared and a Convention ground, the judges are taking two different approaches to civil war claims and to the application of *Salibian* and *Rizkallah*.

It will be noted that in *Rizkallah*, the claim was seen as deficient because those constituting the claimant's group were not "collectively targeted in some way different from the general victims of the ... civil war." Furthermore, *Salibian* contains the proviso that, in order for a claim to succeed, the claimant's fear must not be "that felt indiscriminately by all citizens as a consequence of the civil war". In some cases where these or similar phrases have been invoked,[9] it appears that the Trial Division has seen this language as authority for adopting a comparative approach, which involves comparing the claimant's predicament with the circumstances of other persons in the same country, and requiring that the claimant's predicament be worse than the predicaments of other people.[10]

---

[8] Reference should be made to the Guidelines on *Civilian Non-Combatants Fearing Persecution in Civil War Situations*, issued by the IRB Chairperson pursuant to section 65(3) of the *Immigration Act*, on March 7, 1996. Note that the comparative approach is not recommended in the Chairperson's Guidelines.

[9] Perhaps the most clear-cut adopting of a comparative approach is found in *Isa, Sharmarka Ahmed v. S.S.C.* (F.C.T.D., no. IMM-1760-94), Reed, February 16, 1995, at 4-5.

> Many if not most civil war situations are racially or ethnically based. If racially motivated attacks in civil war circumstances constitute a ground for convention refugee status, then, all individuals on either side of the conflict will qualify. The passages quoted by the Board from [paragraph 164 of] the United Nations Handbook ... indicates that this is not the purpose of the 1951 Convention.

The *Isa* decision was cited approvingly in *Ali, Farhan Omar v. M.C.I.* (F.C.T.D., no. A-1652-92), McKeown, June 26, 1995. Mr. Justice McKeown did not refer to any particular passage in *Isa*. See also: *Siad, Dahabo Jama v. M.E.I.* (F.C.T.D., no. 92-A-6820), Rothstein, April 13, 1993. Reported: *Siad v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 6 (F.C.T.D.); *Barisic, Rajko v. M.C.I.* (F.C.T.D., no. IMM-7275-93), Noël, January 26, 1995.

In *Ali, Shaysta-Ameer v. M.C.I.* (F.C.T.D., no. IMM-3404-95), McKeown, October 30, 1996. Reported: *Ali v. Canada (Minister of Citizenship and Immigration)* (1996), 36 Imm. L.R. (2d) 34 (F.C.T.D.), the Trial Divison certified the following question: "Are refugee claimants excluded from the definition of Convention refugee if all groups in their country, including the group of which they are members, are both victims and perpetrators of human rights violations in the context of civil war?" See, *infra*, footnote 20.

[10] Requiring a worse predicament might mean any one of several things. To succeed, a claimant might have to establish: (i) that the claimant's level of risk is greater than the risk level of persons in other groups, or (ii) that the claimant's risk level is greater than the risk level of other persons in the claimant's own group; or (iii) that the claimant is at risk of suffering harm greater than that which threatens others.

Regarding (i), see: *Siad, supra*, footnote 9, at 9 and 10-11; *Omar, Suleiman Ahmed v. M.C.I.* (F.C.T.D., no. A-1615-92), McKeown, February 7, 1996, at 2; but see *Janjicek, Davorin v. M.C.I.* (F.C.T.D., no. IMM-2242-94), Richard, March 28, 1995, where the parties consented to an order which "remitted [the matter] for a new hearing on the basis that a Convention refugee claimant need not establish that her or his ethnic group is at greater risk than members of other ethnic groups, in accordance with ... *Salibian v. M.E.I.*"

Regarding (ii), see *Hersi, Nur Dirie v. M.E.I.* (F.C.A., no. A-1231-91), MacGuigan, Linden, McDonald, November 4, 1993, at 1: the parties consented to the conclusion that the Refugee Division had adopted a

In other cases, the Court of Appeal and the Trial Division have taken the position that a claimant who belongs to a group[11] which is at risk of attack by some second group may qualify as a Convention refugee - and, in particular, has the requisite nexus - even if persons other than the claimant and groups other than the claimant's group are also at risk of attack by the same or different attackers.

There have also been cases in which the evidence was simply inadequate to make out a claim, regardless of which approach might have been used.[12] And there have been cases in which the Court relied on the fact that the specific claimant possessed particular risk factors, might have been personally targeted, and might have faced a particularly elevated level of risk.[13] It must also be acknowledged that, where several cases are concerned, it is not really possible to say with certainty what was the basis of the Court's disposition, which elements of the Refugee Division's analysis the Court endorsed or rejected, and what propositions may properly be inferred from the Court's disposition.[14]

According to the non-comparative approach,[15] a claim which arises in a context of widespread violence must meet the same conditions as any other claim. The content of those conditions is no different for such a claim, nor is the claim subject to extra requirements or disqualifications. Thus, under this approach, the Refugee Division would consider:

- Serious harm: whether the treatment that the claimant anticipates would amount to serious harm. The question is whether the harm which this particular claimant might experience is serious, not whether the claimant is at risk of harm greater than that to which some other group, or some other person in the claimant's own group, might be subjected.

---

principle at odds with *Salibian, supra,* footnote 1, when it imposed this requirement. See also: *Ahmed, Faisa Talarer v. M.E.I.* (F.C.T.D., no. A-1017-92), Noël, November 2, 1993, at 3; *Abdi, Jama Osman v. M.E.I.* (F.C.T.D., no. A-1089-92), Simpson, November 18, 1993, at 3-4; *Shirwa v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 51 (T.D.), at 64; *Ali, Hassan Isse v. M.E.I.* (F.C.T.D., no. IMM-39-93), MacKay, June 9, 1994, at 7; *Hassan, supra,* footnote 7, at 3-4.

[11] The claimant's group must be one which is definable in terms of a Convention characteristic.

[12] For example: *Shereen, Agha Agha v. M.E.I.* (F.C.A., no. A-913-90), Mahoney, MacGuigan, Linden, March 21, 1994; *Mohamed, Abdirizak Hassan, supra,* footnote 7; *Hersi, Udbi (Ubdi) Hashi v. M.E.I.* (F.C.T.D., no. 92-A-6574), Joyal, May 5, 1993, at 4; *Osoble, Elmi Gure v. M.E.I.* (F.C.T.D., no. A-775-92), McKeown, October 29, 1993; *Abdulle, Shamsa v. M.E.I.* (F.C.T.D., no. A-1298-92), Nadon, December 3, 1993; and *Balayah, Khadar Yusuf v. M.C.I* (F.C.T.D., no. A-1395-92), Simpson, April 24, 1996 (reasons signed July 29, 1996), at 8-10.

[13] For example: *Ali, Hassan Isse, supra,* footnote 10, at 7-8; and *Hotaki, Khalilullah v. M.E.I.* (F.C.T.D., no. IMM-6659-93), Gibson, November 22, 1994, at 4.

[14] For example: *Ahmed, Mohamed Hassan v. M.E.I.* (F.C.T.D., no. A-818-92), McKeown, May 20, 1994; and *Mohamed, Mohamed Ismail v. M.C.I.* (F.C.T.D., no. IMM-5689-93), MacKay, September 8, 1994. See also *Aden, Khadija Hilowle v. M.C.I.* (F.C.A., no. A-602-94), MacGuigan (dissenting), Robertson, McDonald, June 10, 1997, affirming (F.C.T.D., no. A-1018-92), Noël, October 27, 1994.

[15] Recommended in the Chairperson's *Guidelines, supra,* footnote 8, at 7.

- Risk of harm: whether there is a reasonable chance that the claimant would experience the apprehended harm. The issue is not whether this particular claimant carries a degree of risk greater than that which attaches to some other person or group.

- Nexus:[16] whether there is a nexus between the anticipated inflicting of harm upon the claimant and one of the Convention grounds.[17] It is a matter of identifying the particular source(s) or perpetrator(s) who might inflict harm upon this particular claimant, and determining whether that perpetrator's reason for inflicting harm would tally with one of the grounds.[18] The claimant is not to be disqualified because other persons in the claimant's group or in different groups might also be targeted for similar reasons. Nor is a non-combatant claimant to be fixed with some sort of "collective guilt" because combatant members of the claimant's group are inflicting harm on members of other groups.

A requirement that the claimant be in a predicament which is worse than the circumstances of fellow nationals may be difficult to reconcile with certain passages in *Salibian* and *Rizkallah* and with the terms of the Convention refugee definition. Such a requirement seems to have little if any support in post-*Rizkallah* decisions from the Court of Appeal, and may be at odds with those decisions. The passages in *Salibian* and *Rizkallah* which have sometimes been referred to when engaging in a hardship comparison contain a measure of vagueness; certainly they are not substitutes for an element-by-element analysis of a claim, nor do they negate *Salibian*'s assertion that a claimant is not barred from succeeding because his or her problems have arisen in the context of a civil war.[19]

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[16] *Salibian, supra,* footnote 1, points out that there may be a nexus in a civil war context. *Rizkallah, supra,* footnote 5, may be seen as adding to *Salibian* little more than a reminder that nexus may also be absent in such a situation. Simple political instability does not make for a well-founded fear of persecution: *Megag, Sahra Abdilahi v. M.E.I.* (F.C.T.D., no. A-822-92), Rothstein, December 10, 1993, at 2. See also *Ezeta, Octavio Alberto del Busto v. M.C.I.* (F.C.T.D., no. IMM-2021-95), Cullen, February 15, 1996, at 3-4, where the claimant's difficulties were a result of the unsettled and dangerous political climate in Peru, rather than being linked to a Convention ground.

[17] In *Khalib, Amina Ahmed v. M.E.I.* (F.C.T.D., no. A-656-92), MacKay, March 30, 1994. Reported: *Khalib v. Canada (Minister of Employment and Immigration)* (1994), 24 Imm. L.R. (2d) 149 (F.C.T.D.), the claimants' home area, in which the claimants' Issaq clan predominated, had been sown with mines by the former Somali government, allegedly with the intention of harming Issaqs. Many mines remained, and the claimants feared injury. The Refugee Division held that the danger was one faced indiscriminately by all people in the area; and in upholding the decision, the Court noted that while Issaqs may have been the majority, the danger was nevertheless faced by all.

[18] *Canada (Attorney General) v. Ward,* [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85, at 747, per La Forest J., "The examination of the circumstances should be approached from the perspective of the persecutor, since that is determinative in inciting the persecution."

[19] "The Board cannot hide behind the civil war situation and automatically find that claimants from Somalia are not refugees." *Osman, Ashu Farah v. M.C.I.* (F.C.T.D., no. IMM-1295-94), Cullen, January 26, 1995, at 5.

9.2.1.2. The Non-Comparative Approach is the Legal and Preferred Test

In *Ali, Shaysta-Ameer*,[20] the Court of Appeal affirmed that the proper test for persecution in a civil war context is the non-comparative approach set out in the *Salibian* and *Rizkallah* cases and advocated in the Chairperson's *Guidelines, Civilian Non-Combatants Fearing Persecution in Civil War Situations*, issued on March 7, 1996. The Court cited, with approval, the following passages from the *Guidelines*:

> Non-comparative Approach
>
> The non-comparative approach to the assessment of a claim is the approach advocated in these Guidelines. This approach is more in accord with the third principle set out in *Salibian*, the decisions of the Court of Appeal in *Rizkallah* and *Hersi, Nur Dirie*, as well as the wording of the Convention refugee definition. With this approach, instead of an emphasis on comparing the level of risk of persecution between the claimant and other individuals (including individuals in the claimant's own group) or other groups, the Court examines the claimant's particular situation, and that of her group, in a manner similar to any other claim for Convention refugee status.
>
> The issue is not a comparison between the claimant's risk and the risk faced by other individuals or groups at risk for a Convention reason, but whether the claimant's risk is a risk of sufficiently serious harm and is linked to a Convention reason as opposed to the general, indiscriminate consequences of civil war. A claimant should not be labelled as a "general victim" of civil war without full analysis of her personal circumstances and that of any group to which she may belong. Using a non-comparative approach results in a focusing of attention on whether the claimant's fear of persecution is by reason of a Convention ground. (footnotes omitted)

9.3. PROSECUTION, OR PERSECUTION FOR A CONVENTION REASON?

9.3.1. Limits to Acceptable Legislation and Enforcement

Any state is entitled to have, and to enact, laws which will contribute to the better, safer, more just functioning of the national community and its government. And any state is entitled to impose penalties upon those who break its laws. However, from the standpoint of international human rights law, there is a line over which the state cannot legitimately step. To determine whether the state has limited itself to its proper sphere or has overstepped, the Refugee Division must be mindful of the distinction between two kinds of cases: (a) cases in which the treatment foreseen for the claimant would be punishment for nothing other than the breach of a law that does not violate human rights, and does not adversely differentiate on a Convention ground, either on its face or in its application; and (b) cases in which the claimant's actions might contravene a law of his homeland, but in which the law's terms or its anticipated enforcement might infringe upon human rights and adversely differentiate.

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[20] *Ali, Shaysta-Ameer v. M.C.I.* (F.C.A., no. A-772-96), Décary, Stone, Strayer, January 12, 1999.

9.3.2. Laws of General Application

The Federal Court has dealt at some length with questions relating to "laws of general application". This term refers to a law which, on its face, applies to a country's entire population, without differentiation; and the term is not properly employed if the law in question targets only some subset of the population.[21] For a time, the leading decision on this topic was *Musial*;[22] however, in the more recent case of *Zolfagharkhani*,[23] the Court of Appeal examined the theme in greater depth and provided interpretation of *Musial*. Therefore, *Zolfagharkhani* must now be regarded as pre-eminent. *Musial* should be used with caution, and only after taking *Zolfagharkhani* into account.

In *Zolfagharkhani*, the Court rejected the proposition that, so long as the action taken by a government against a claimant is the enforcement of "an ordinary law of general application", the government is necessarily engaging in prosecution and not persecution.[24] In a dictatorial or totalitarian state, any ordinary law of general application may well be an act of political oppression.[25]

The Court of Appeal in *Zolfagharkhani*[26] set forth "some general propositions relating to the status of an ordinary law of general application in determining the question of persecution":

> (1) The statutory definition of Convention refugee makes the intent (or any principal effect)[27] of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.[28]

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[21] *Fathi-Rad, Farideh v. S.S.C.* (F.C.T.D., no. IMM-2438-93), McGillis, April 13, 1994, at 4. See also *Namitabar v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 42 (T.D.), at 46. Compare *Altawil, Anwar Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2365-95), Simpson, July 25, 1996. In *Canada (Secretary of State) v. Namitabar* (F.C.A., no. A-709-93), Décary, Hugessen, Desjardins, October 28, 1996, the Court overturned the Trial Division on the basis that the CRDD credibility findings were not ambiguous. With respect to the issue of wearing veils in Iran, the Court was of the view that "the Refugee Division may have expressed itself incorrectly [but] that has no importance in the case at bar since the female [claimant] voluntarily complied with the clothing code and did not even display reluctance to do so..."

[22] *Musial v. Canada (Minister of Employment and Immigration)*, [1982] 1 F.C. 290 (C.A.). Speaking for the majority at 294, Pratte J. said:

> A person who is punished for having violated an ordinary law of general application, is punished for the offence he has committed, not for the political opinions that may have induced him to commit it. ... [A] person who has violated the laws of his country of origin by evading ordinary military service, and who merely fears prosecution and punishment for that offence in accordance with those laws, cannot be said to fear persecution for his political opinions even if he was prompted to commit that offence by his political beliefs.

[23] *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 (C.A.).

[24] *Zolfagharkhani, ibid.*, at 549. See also *Fathi-Rad, supra,* footnote 21, at 4.

[25] *Zolfagharkhani, supra,* footnote 23, at 549. *Castaneda, Robert Martinez v. M.E.I.* (F.C.T.D., no. A-805-92), Noël, October 19, 1993, at 3 (exit laws).

[26] *Zolfagharkhani, supra,* footnote 23, at 552.

[27] In *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.), at 319, Linden J.A. said that the Refugee Division "wrongly required that a 'persecutory intent' be present, whereas a 'persecutory effect' suffices."

> (2) But the neutrality of an ordinary law of general application, *vis-à-vis* the five grounds for refugee status, must be judged objectively by Canadian tribunals and courts when required.[29]
>
> (3) In such consideration, an ordinary law of general application, even in non-democratic societies, should ... be given a presumption of validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.[30]
>
> (4) It will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.

Seriousness of harm is another issue which has been addressed in connection with laws of general application. It is quite possible that a law or policy of general application may well be violative of basic human rights.[31] Also, in *Cheung* it was decided that a law of general application may be persecutory where the penalty is disproportionate to the objective of the law, regardless of the authorities' intent:

> ... if the punishment or treatment under a law of general application is so Draconian as to be completely disproportionate to the objective of the law, it

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[28] Compare *Suleman, Adams v. M.E.I.* (F.C.A., no. A-1297-91), Desjardins, Décary, Létourneau, May 5, 1994, where the Court, without referring to any authority, stated, at 2:

> We are not certain that ... the Refugee Division analysed the claimant's acts in the context in which he committed them, and that it considered the question of whether his acts, although illegal, did not have a political connotation or were not committed for political reasons or in a political context that could then found a reasonable fear of persecution based on political opinion, whether real or imputed by the agent of persecution.

Thus, it may be necessary to analyze the actions of the claimant and the state in context. See also *Masoudifar, Kambiz v. M.E.I.* (F.C.T.D., no. IMM-3677-93), Wetston, May 25, 1994, at 2-3. Compare *Antonio, Pacato Joao v. M.E.I.* (F.C.T.D., no. IMM-1072-93), Nadon, September 27, 1994, at 6-8 (re: treason, espionage and sabotage).

[29] See *Zhu, Yong Liang v. M.E.I.* (F.C.A., no. A-1017-91), MacGuigan, Linden, Robertson, January 28, 1994, at 2-3. In *Daghighi, Malek v. M.C.I.* (F.C.T.D., no. A-64-93), Reed, November 16, 1995, the Refugee Division had held that the Iranian claimant had simply run afoul of "laws or a policy of general application founded on fundamentalist principles of Islamic law". But evidence indicated that the claimant had incurred the authorities' displeasure for Western tendencies and unacceptable religious views, and that he had been obliged to undergo religious instruction. The Court rejected the conclusion that his difficulties were not related to a Convention ground.

In *Chan* (F.C.A.), Mr. Justice Heald ruled that punishment for breach of a government policy is not punishment for political opinion if the breach will be perceived by the authorities not as a challenge to their authority but only as a breach of a law: *Chan v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 675, at 695; (1993), 20 Imm. L.R. (2d) 181 (C.A.). See also: *Barima v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 30 (T.D.), at 37; *Liang, Zhai Kui v. M.E.I.* (F.C.T.D., no. IMM-2487-93), Denault, November 2, 1993, at 3.

[30] Compare *Drozdov, Natalia v. M.C.I.* (F.C.T.D., no. IMM-94-94), Joyal, January 9, 1995, at 5.

[31] *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, per La Forest J. (dissenting) at 632.

> may be viewed as persecutory. This is so regardless of whether the intent of the punishment or treatment is persecution. Cloaking persecution with a veneer of legality does not render it less persecutory. Brutality in furtherance of a legitimate end is still brutality.[32]

In *Chan* (S.C.C.), Mr. Justice La Forest approved the comments of Linden J.A. regarding "state authority arguments" (as they were called by La Forest J.).[33] And La Forest J. provided his own observations with respect to the "legitimate end" idea:

> ... I do not in general consider it appropriate for courts to make implicit or explicit pronouncements on the validity of another nation's social policies. In the present case, the full extent of the Chinese population policy is unknown in this country and undue speculation as to its legitimacy serves no purpose. Whether the Chinese government decides to curb its population is an internal matter for that government to decide. Indeed, there are undoubtedly appropriate and acceptable means of achieving the objectives of its policy that are not in violation of basic human rights. *However, when the means employed place broadly protected and well understood basic human rights under international law such as the security of the person in jeopardy, the boundary between acceptable means of achieving a legitimate policy and persecution will have been crossed. It is at this point that Canadian judicial bodies may pronounce on the validity of the means* by which a social policy may be implemented *in an individual* case by either granting or denying Convention refugee status ... [Emphasis added.][34]

(The distinction between the authorities' objective and their means of achieving it is discussed further in section 9.3.3. of this chapter.)

Furthermore, a penalty which is disproportionate to the *offence* may constitute persecution.[35] When imposed for certain offences, the death penalty may not constitute

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[32] *Cheung, supra,* footnote 27, at 323, per Linden J.A. See also *Fathi-Rad, supra,* footnote 21, at 4-5. Compare *Chan* (F.C.A.), *supra,* footnote 29, at 724, per Desjardins J.A.

[33] *Chan* (S.C.C.), *supra,* footnote 31, per La Forest J. (dissenting) at 634.

[34] *Chan* (S.C.C.), *ibid.,* per La Forest J. (dissenting) at 631

[35] *Namitabar* (T.D.), *supra,* footnote 21; *Rodriguez-Hernandez, Severino Carlos v. S.S.C.* (F.C.T.D., no. A-19-93), Wetston, January 10, 1994, at 4; *Denis, Juan Carlos Olivera v. S.S.C.* (F.C.T.D., no. IMM-4920-93), Nadon, February 18, 1994, at 4, *Fathi-Rad, supra,* footnote 21, at 4-5. In *Namitabar* (F.C.A), *supra,* footnote 21, the Court overturned the Trial Division on the basis that the CRDD credibility findings were not ambiguous. With respect to the issue of wearing veils in Iran, the Court was of the view that "the Refugee Division may have expressed itself incorrectly [but] that has no importance in the case at bar since the female [claimant] voluntarily complied with the clothing code and did not even display reluctance to do so..." See also *Rabbani, Farideh v. M.C.I.* (F.C.T.D., no. IMM-2032-96), McGillis, June 3, 1997.

persecution.[36]

If the Refugee Division applies the term "law of general application", it must be careful to include within this characterization only what is actually authorized by the law in question. Where a given policy constitutes a law of general application, a particular sanction used to enforce that policy may not be a law of general application.[37] And even if such a law does figure in the claim, the Division certainly must not disregard measures which are beyond the law. Where there is evidence of extra-judicial punishment or (other) lack of due legal process, consideration must not be limited to the actual legislation itself.[38] Indeed, perversions in the application of the law, such as the bringing of a trumped-up charge, and interference in the due process of law, may be aspects of persecutory treatment.[39] In one instance, the Court of Appeal has said that pursuit of a claimant for refusing to carry out a government order will constitute mere prosecution only if the order was a "valid" one, and not one that was "illegal" or with "no legal foundation".[40]

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[36] *Antonio, supra*, footnote 28, at 11-12. See also, *Chu, Zheng-Hao v. M.C.I.* (F.C.T.D., no. IMM-5159-94), Jerome, January 17, 1996, at 5. See also *Singh, Tejinder Pal v. M.C.I.* (F.C.T.D., no. IMM-5294-97), Muldoon, December 23, 1997 (supplementary reasons), at paragraphs 9-13.

[37] *Cheung, supra*, footnote 27, at 322. See also: *Lin, Qu Liang v. M.E.I.* (F.C.A., no. 93-A-142), Rouleau, July 20, 1993. Reported: *Lin v. Canada (Minister of Employment and Immigration)* (1993), 24 Imm. L.R. (2d) 208 (F.C.T.D.); and *Chan* (S.C.C.), *supra*, footnote 31, per Major J. at 658. Also regarding extra-judicial punishment, see *Tocjeva, Tatiana v. M.C.I.* (F.C.T.D., no. IMM-4808-96), Cullen, September 11, 1997, at 5.

[38] Regarding extra-judicial punishment, see: *Padilla, Higinio Avalo v. M.E.I.* (F.C.A., no. A-398-89) Mahoney, MacGuigan, Linden, January 31, 1991. Reported: *Padilla v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 1 (F.C.A.), at 4; *Cheung, supra*, footnote 27, at 323; *Addo, Samuel v. M.E.I.* (F.C.A., no. A-614-89), Mahoney, Hugessen, Gray, May 7, 1992; and *Moslim, Mahdi Fraih v. S.S.C.* (F.C.T.D., no. 93-A-166), McGillis, February 14, 1994, at 2. Regarding lack of due process, see: *Namitabar, supra*, footnote 21, at 47.

An enactment may itself allow for denial of due process, thereby increasing the chances that persecution will occur; see, for example, *Balasingham, Satchithananthan v. S.S.C.* (F.C.T.D., no. IMM-2469-94), Rothstein, February 17, 1995, at 2-3.

In *M.E.I. v. Satiacum, Robert* (F.C.A., no. A-554-87), Urie, Mahoney, MacGuigan, June 16, 1989. Reported: *Canada (Minister of Employment and Immigration) v. Satiacum* (1989), 99 N.R. 171 (F.C.A.), the Court held that the claimant's fear of extra-judicial punishment, which was based partly on alleged irregularities in prosecution, was not well-founded. Furthermore, the Court stated, at 9, that "... Canadian tribunals have to assume a fair and independent judicial process in the foreign country. In the case of a non-democratic State contrary evidence might be readily forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching ... [some key element of the judicial system]." See also page 11.

[39] *Kicheva, Zorka v. M.E.I.* (F.C.T.D., no. A-625-92), Denault, December 23, 1993, at 2. The fact of prosecution might conceivably be objectionable where it would entail the claimant's being prosecuted a second time for an offence already dealt with conclusively (i.e., a situation of "double jeopardy"), however, see *Chu, supra*, footnote 36, especially at 4.

[40] *Mohamed, Abd Almoula Mohamed v. M.E.I.* (F.C.A., no. A-26-92), Strayer, MacGuigan, Robertson, November 7, 1994. The Court offered little elaboration in its brief reasons, and did not clearly articulate its measure(s) of validity. See also *Diab, Wadih Boutros v. M.E.I.* (F.C.A., no. A-688-91), Isaac, Marceau, McDonald, August 24, 1994, at 3.

If enforcement of the law against the claimant would proceed in accordance with due process, and if the sanctions for violating a particular law are not serious, the situation is not one of persecution.[41]

9.3.3. Policing Methods, National Security and Preservation of Social Order

In some situations, the argument for the acceptability of state actions may rely not on the presence of any particular authorizing law (if any), but instead on the idea that those actions were aimed at the preservation of social order, against dangers such as crime and terrorism. Indeed, the actions in question, rather than being approved by law, may be of very doubtful legality.

In this context as well, the courts have grappled with the question of whether harmful conduct may be excused by the purpose which prompts the authorities to engage in the conduct.[42] In the first place, the above-quoted statement from *Cheung* - that "[b]rutality in furtherance of a legitimate end is still brutality"[43] - is again apposite. It is not rendered less relevant by the fact that the brutality is perpetrated without the screen, or superficial legitimation, of an authorizing law. Moreover, in *Thirunavukkarasu*,[44] a later decision dealing more directly with the notion of preserving the social order, the Court of Appeal ruled that "beatings of suspects can never be considered 'perfectly legitimate investigations' [into criminal or terrorist activities], however dangerous the suspects are thought to be."[45] The Court also affirmed that

> ... the state of emergency in Sri Lanka cannot justify the arbitrary arrest and detention as well as beatings and torture of an innocent civilian at the hands of the very government from whom the claimant is supposed to be seeking safety.[46]

It is inappropriate to dismiss mistreatment on the theory that, by transgressing the law, the claimant forfeited any right to complain about any treatment that was meted out to him or her in response. Rather than stating simply that the claimant could not expect to receive the authorities' approval for committing illegal acts, the Refugee Division must determine whether the treatment suffered by the claimant constituted persecution in the circumstances.[47]

In a number of cases, the Trial Division has applied reasoning of the kind that was subscribed to in *Cheung* and *Thirunavukkarasu*.[48] However, there have also been cases in which

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[41] *Drozdov, supra*, footnote 30, at 5.

[42] In the case of a claimant with links to, for example, an organization which uses violence to achieve political ends, it may be appropriate to consider whether Article 1F applies.

[43] *Cheung, supra* footnote 27, at 323, per Linden J.A.

[44] *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (C.A.).

[45] *Thirunavukkarasu, ibid.*, at 600, per Linden J.A.

[46] *Thirunavukkarasu, ibid.*, at 601, per Linden J.A

[47] *Toledo, Ruben Fernando San Martin v. M.E.I.* (F.C.A., no. A-205-91), Hugessen, Desjardins, Décary, March 1, 1993. See also *Singh, Tejinder Pal*, supra, footnote 36, at paragraph 15, though compare paragraph 24.

[48] For example: *Kaler, Minder Singh v. M.E.I.* (F.C.T.D., no. IMM-794-93), Cullen, February 3, 1994, at 5-6; *Rajaratnam, Logeswaran v. M.E.I.* (F.C.T.D., no. A-678-92), Nadon, June 29, 1994, at 8; *Sulemana, Halilu v.*

such reasoning has not been applied by the Trial Division.[49] In some of these latter cases, the Trial Division judgments appear to contradict the letter and spirit of the opinions from the Court of Appeal.

According to the Trial Division, national security and peace and order are valid social objectives of any state, and temporary derogation of civil rights in an emergency does not necessarily amount to persecution.[50] In this regard, before finding mistreatment to be non-persecutory because there is an emergency, the Refugee Division should consider several matters: Is there indeed an emergency? Is the particular right that is being violated a derogable right, or is it non-derogable?[51] If the right is derogable, what is the nature of the particular emergency, what is the extent of the particular derogation, and is there a logical nexus between the emergency and the derogation?

The Trial Division has said that short-term detentions for the purpose of preventing disruptions[52] or dealing with terrorism[53] do not constitute persecution. It may also be proper to conclude that some forms of violence, including beatings, do not amount to persecution in the circumstances of a particular case, even though they are reprehensible and violative of human rights;[54] for example, the mistreatment may not have been repetitive or sufficiently severe,[55] and

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M.C.I. (F.C.T.D., no. IMM-3355-94), Muldoon, March 17, 1995, at 13; *Iramachanthiran, Irathinam v. M.C.I.* (F.C.T.D., no. IMM-2789-95), Simpson, April 24, 1996 (reasons signed July 29, 1996), at 7. In *Sran, Gurjeet Singh v. M.C.I.* (F.C.T.D., no. IMM-3195-96), McKeown, July 29, 1997, where the claimant had been repeatedly and badly tortured while in police custody, the Court observed: "Torture can never be excused at any time and it is insufficient to characterize it simply as abuse."

[49] For example: *Manihani, Saravjit Singh v. M.E.I.* (F.C.T.D., no. A-753-92), Noël, September 3, 1993, at 3; *Naguleswaran, Pathmasilosini (Naguleswaran) v. M.C.I.* (F.C.T.D., no. IMM-1116-94), Muldoon, April 19, 1995. In *Naguleswaran*, at 4-5, the Court commented that those belonging to militant organizations ought not to be "treated with front-parlour civility".

[50] *Brar, Jaskaran Singh v. M.E.I.* (F.C.T.D., no. IMM-292-93), Rouleau, September 8, 1993, at 3; *Papou, Bhatia v. M.E.I.* (F.C.T.D., no. A-1040-92), Rouleau, August 15, 1994, at 3. Note that both of these cases were decided by the same judge. See also *Naguleswaran, supra,* footnote 49 ,at 4-6: Muldoon J. expressed the view that "western concepts of the administration of justice will just not work in some other countries" (emphasis omitted), given the need of those countries to safeguard public security, cope with civil war, and combat terrorism. And see *Nithiyanathan, Anusha v. M.C.I.* (F.C.T.D., no. IMM-3402-96), Muldoon, July 30, 1997. at 2-3.

[51] *Alfred, Rayappu v. M.E.I.* (F.C.T.D., no. IMM-1466-93), MacKay, April 7, 1994, at 5: "The tribunal did not assess the physical mistreatment of the applicant by Colombo police in terms of persecution. Under the *International Covenant on Civil and Political Rights*[,] Articles 7 and 4 make clear that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment even in times of public emergency." See also *Kanapathypillai, Indrarajan v. M.C.I.* (F.C.T.D., no. IMM-3724-96), Heald, July 11, 1997, at 3.

[52] *Brar, supra,* footnote 50, at 3.

[53] *Mahalingam, Paramalingam v. S.G.C.* (F.C.T.D., no. A-79-93), Joyal, November 2, 1993, at 6; *Naguleswaran, supra* footnote 49, at 5-6. But see *Bragagnini-Ore, Gianina Evelyn v. S.S.C.* (F.C.T.D., no. IMM-2243-93), Pinard, February 4, 1994, at 2.

[54] *El Khatib, Naif v. M.C.I.* (F.C.T.D., no. IMM-5182-93), McKeown, September 27, 1994, at 4; *Joseph, Christy Shanthakumar v. S.S.C.* (F.C.T.D., no. IMM-7503-93), MacKay, November 18, 1994, at 3-4.

there may be no prospect of its being repetitive or sufficiently severe in the future. However, given *Cheung*, and *Thirunavukkarasu*, the Refugee Division should be cautious about deeming violent conduct to be non-persecutory.

9.3.4. Enforcement and Serious Possibility

Even if the evidence speaks of some harm that would qualify as serious, the Refugee Division must consider whether there is a serious possibility that the harm will actually come to pass. A statute which outlaws the claimant's conduct or characteristic may be in existence, and it may provide for unconscionably severe punishment for that conduct or characteristic, but this does not necessarily mean there is a serious possibility that the punishment will be inflicted on the claimant. The Supreme Court has emphasized that, in a determination as to whether the claimant's fear is objectively well founded, the relevant factors include the laws in the claimant's homeland, together with the manner in which they are applied. In this connection, the Court cited paragraph 43 of the *UNHCR* Handbook.[56] Enforcement measures may vary from area to area within a country, and if this is the case, "the reasonableness of a fear of persecution depends, *inter alia*, on the practices of the relevant local authority".[57]

A pattern of non-enforcement might imply that there is less than a serious possibility.[58]

For additional guidance regarding the distinction between prosecution and persecution, see: IRB Preferred Position Paper, *Prosecution as a Basis for a Well-Founded Fear of Persecution*, March 1992. [NOTE: this paper does not include case law which has appeared since March 1992.]

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[55] *Murugiah, Rahjendran v. M.E.I.* (F.C.T.D., no. 92-A-6788), Noël, May 18, 1993, at 3-4; *Soma, Ester Elvira v. M.C.I.* (F.C.T.D., no. A-1129-92), Richard, November 15, 1994, at 3; *Kandiah, Palachandran v. M.C.I.* (F.C.T.D., no. IMM-7125-93), Cullen, December 7, 1994, at 7; *Balasubramaniam, Sriharan v. M.C.I.* (F.C.T.D., no. IMM-5414-93), Muldoon, December 13, 1994, at 4-6; *Yassodaran, Magalingam v. M.C.I.* (F.C.T.D., no. IMM-1677-95), Reed, April 4, 1996, at 2; *Iramachanthiran, supra,* footnote 48, at 7-8; *Nithiyanathan, supra*, footnote 50, at 3; and *Puvanendiran, Premalatha v. M.C.I.* (F.C.T.D., no. IMM-3595-96), Heald, July 8, 1997, at page 2.

[56] *Chan* (S.C.C.), *supra*, footnote 31, per Major J., at 664-5 and 666-7.

[57] *Chan* (S.C C.), *ibid.*, per Major J., at 658. See also page 666.

[58] *Valentin v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 390 (C.A.), at 394, and *Nejad, Saeed Javidani-Tabriz v. M.C.I.* (F.C.T.D., no. IMM-4624-93), Richard, November 16, 1994, at 3-4 (re exit laws); *Butt, Abdul Majid (Majeed) v. S.G.C.* (F.C.T.D., no. IMM-1224-93), Rouleau, September 8, 1993 (re Pakistan's Ordinance XX), *Drozdov, supra*, footnote 30, at 5 (re stripping of citizenship); *John, Lindyann v. M.C.I.* (F.C.T.D., no. IMM-2833-95), Simpson, April 24, 1996 (reasons signed July 29, 1996), at 10, 17-19 and 20 (re law criminalizing homosexual acts).

More generally, note *Torres, Alejandro Rodriguez v. M.C.I.* (F.C.T.D., no. IMM-503-94), Simpson, February 1, 1995 (reasons signed April 26, 1995), at 4-5: "In my view, refugee claims are not to be considered on a theoretical level which ignores the realities of the evidence. ... [The Refugee Division] was entitled to make a practical assessment of the possibility of the Applicant facing future persecution."

9.3.5. Exit Laws

Some countries have laws which impose restrictions on travel abroad. Such laws may make it an offence to depart without prior permission (illegal departure), or to stay abroad beyond some stipulated period (overstay),[59] or to visit certain countries.[60] Where such laws exist, generally sanctions for breaching them are also on the books. In some instances there may, in addition, be provision for extending the authorized travel period before it ends, or for obtaining retroactive authorization of travels that were not approved in advance.

In *Valentin*, Marceau J.A. spoke to those situations in which "the claimant may face criminal sanctions in his or her own country for leaving the territory without authorization or for remaining abroad longer than his or her exit visa allowed."[61] His Lordship stated:[62]

> Counsel then challenged the Board's rejection of the argument based on the existence of section 109 of the Czech Criminal Code [the exit law] and the fear of imprisonment that the section aroused in the claimants ... [C]ounsel recalled that there was one school of thought ... [which was] prepared to admit that the mere fear of punishment under a provision such as section 109 ... could amount to a well-founded fear of persecution and provide valid grounds for a refugee claim. We know that some supporters of this theory argue a sort of presumption that the authorities of the national State will automatically and inevitably interpret the decision of their fellow-citizen to leave the country without authorization, or to remain abroad beyond the time provided, as evidence of political opposition. Counsel acknowledged that this is an extreme position, which the vast majority of commentators rejected, and did not urge its acceptance *per se* ...
>
> ...
>
> Neither the international Convention nor our *Act*, which is based on it, as I understand it, had in mind the protection of people who, having been subjected to no persecution to date, themselves created a cause to fear persecution by freely, of their own accord and with no reason, making themselves liable to punishment for violating a criminal law of general application. I would add ... that the idea does not appear to me even to be supported by the fact that the transgression was motivated by some dissatisfaction of a political nature ..., because it seems to me, first, that an isolated sentence can only in very exceptional cases satisfy the elements of

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[59] There may be an overstay law which applies to all residents of a country or to all of the country's citizens, and which provides for penalties of fine or incarceration. Alternatively, a law may provide that a non-citizen resident (including a stateless resident) who travels abroad must return and report periodically, and that failure to do so will result in the loss of resident status and the right to return: e.g. *Altawil, supra*, footnote 21.

[60] For an example of this last situation, see *Losolohoh, James Salah v. M.E.I.* (F.C.T.D., no. IMM-2324-94), Wetston, December 13, 1994.

[61] *Valentin, supra*, footnote 58, at 392.

[62] *Valentin, supra*, footnote 58, at 394-396.

> repetition and relentlessness found at the heart of persecution[63] ..., but particularly because the direct relationship that is required between the sentence incurred and imposed and the offender's political opinion does not exist.

However, where the claimant has violated an exit law, the decision to punish the claimant for that infraction, or to impose a certain degree of punishment, might be due to some characteristic of the claimant such as his political record.[64] Repercussions beyond the statutory sentence may suggest that the actions of the authorities are persecutory.[65]

9.3.6. Military Service: Conscientious Objection, Evasion, Desertion

The claimant's problems may be connected with a disinclination to serve in the military. Either the claimant entered the military and left it without authorization (i.e., the claimant deserted);[66] or the claimant was ordered to report for service, but refused to report or refused to be inducted; or the claimant has not yet received a call-up, but anticipates that the order will be forthcoming and does not wish to comply.

The courts have established some very basic points of departure for the analysis of such claims. Thus, conscientious objectors and army deserters are not automatically included in the Convention refugee definition, nor is a person precluded from being a Convention refugee because the person is a conscientious objector or deserter.[67] It is not persecution for a country to have compulsory military service.[68] An aversion to military service or a fear of combat is not in itself sufficient to justify a fear of persecution.[69]

Proceeding to a more detailed analysis of the claim, the Refugee Division must consider whether the circumstances disclose a nexus between the treatment feared and one of the Convention grounds. *Zolfagharkhani*[70] is the leading case with respect to nexus (and other

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[63] However, see *M.S. v. M.C.I.* (F.C.T.D., no. A-132-91), McKeown, August 27, 1996, at 4. The Court suggested that the severity of the penalty might be a very significant factor. See also *Asadi, Sedigheh v. M.C.I.* (F.C.T.D., no. IMM-1921-96), Lutfy, April 18, 1997, at 4.

[64] *Shakarabi, Seyed Hassan v. M.C.I.* (F.C.T.D., no. IMM-2440-95), Reed, March 21, 1996, at 2 and 3. See also *Asadi, supra*, footnote 63, at 4.

[65] *Castaneda, supra*, footnote 25, at 4-5. See also *Moslim, supra*, footnote 38. In *Chow, Wing Sheung v. M.C.I.* (F.C.T.D., no. A-1476-92), McKeown, March 26, 1996, at 3, the Court noted that the Refugee Division had found that neither the maximum prescribed penalty nor the penalties actually imposed were harsh.

[66] For an example of a situation which was found not to constitute desertion, see *Nejad, supra,* footnote 58, at 3.

[67] *Musial, supra*, footnote 22, at 292-293, per Thurlow C.J.

[68] *Popov, Leonid Anatolievich v. M.E.I.* (F.C.T.D., no. IMM-2567-93), Reed, April 11, 1994; Reported: *Popov v. Canada (Minister of Employment and Immigration)* (1994), 24 Imm. L.R. (2d) 242 (F.C.T.D.), at 244.

[69] *Garcia, Marvin Balmory Salvador v. S.S.C.* (F.C.T.D., no. IMM-2521-93), Pinard, February 4, 1994. See also *Barisic, supra*, footnote 9, at 4, where the claimant avoided conscription into the Croatian army because he did not wish to kill people with whom he had lived, the Court said that the Refugee Division was entitled to conclude that his motives were those shared by all reluctant combatants.

[70] *Zolfagharkhani, supra,* footnote 23.

factors) in military-service situations.[71] The principles quoted from that case earlier on[72] should be referred to for guidance when determining whether the claimant's difficulties regarding service should be ascribed to a Convention ground, or instead should be considered punishment for a violation of a law of general application.

Zolfagharkhani indicates that it is not the claimant's motivation for refusing to serve which is relevant, but rather the intent or principal effect of the conscription law.[73] In accordance with this guideline, one must ask whether the reaction of the authorities to the claimant's refusal to serve would be a function of some Convention attribute which the claimant has, or would be perceived by the authorities as having (a political opinion often being the likeliest possibility).[74] Even where the claimant has no strong convictions which should be permitted to interfere with the claimant's serving, his refusal might be regarded by the authorities as an indication of an opinion which is frowned upon by them.

However, it would seem that the motivation of the claimant has not been completely discarded as a factor in claims concerning military service, although the cases do not make clear to which element or elements (nexus, serious harm) it may relate, and exactly how it should be worked into the consideration of a particular element. In *Zolfagharkhani* itself, the Court of Appeal focused on the claimant's reason of conscience for not wishing to serve, and laid considerable emphasis on the fact that the particular combat technique to which the claimant objected was abhorred by the international community; but the Court did not provide much explanation as to how such attending to the claimant's reason of conscience was to be reconciled with the view that the claimant's motivation is not relevant.[75] Furthermore, in subsequent decisions, the Trial Division has repeatedly considered the claimant's conscience, as well as the attitude of the international community to operations criticized by the claimant. Reliance has even been placed explicitly upon the "applicant's motive".[76] The reader should bear in mind

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[71] *Musial, supra,* footnote 22, also dealt with military service but *Zolfagharkhani, supra,* footnote 23 has replaced *Musial* as the chief authority not only with respect to the more encompassing topic of laws of general application, but also with respect to this particular example of such laws. See Chapter 9, section 9.3.2.

[72] See Chapter 9, section 9.3.2.

[73] *Zolfagharkhani, supra,* footnote 23, at 550 and 552.

[74] See *Blagoev, Stoycho Borissov v. M.E.I.* (F.C.A., no. A-827-91), Heald, Desjardins, Linden, July 19, 1994, at 2, where the Court was of the view that the claimant, a deserter, had not established that the applicable law, "being a law of general application, would be applied otherwise than on a neutral and equitable basis." Also *Ahani, Roozbeh v. M.C.I.* (F.C.T.D., no. IMM-4985-93), MacKay, January 4, 1995, at 5, where the Court said that the Refugee Division was entitled to find that the detentions and any associated mistreatment were related to the claimant's failure to complete his military service, rather than to his Kurdish origin or related political views. On the other hand, see *Diab, supra,* footnote 40, at 3, where the Court held that the Refugee Division erred in that it failed to consider whether the claimant's opposition to serving in a particular militia (which had press-ganged him) constituted a political opinion which could result in persecution.

[75] *Zolfagharkhani, supra,* footnote 23, at 553-556.

[76] *Sladoljev, Dejan v. M.E.I.* (F.C.T.D., no. IMM-3160-94), Cullen, July 4, 1995, at 4. The Court did not mention *Zolfagharkhani, supra,* footnote 23.

these ambiguities in the case law when reviewing the following observations on reasons-of-conscience claims.[77]

When addressing a case in which the claimant invokes reasons of conscience for his aversion to performing military service, the Refugee Division must decide whether the particular reasons adduced are of sufficient significance.

As a sidebar to this issue, there is some debate - and some confusion - about the meaning of the term "conscientious objector". In *Popov*, the Trial Division indicated that, "in the usual sense", this term applied to a person who "was a pacifist or was against war and all militarism on the grounds of principle, either religious or philosophical."[78] It may be correct to reserve this particular term for persons who are opposed to all militarism; but at the same time, it must be appreciated that what is important for the determination of a claim is not whether this particular label fits.

The important question is whether a claimant's reason of conscience will be sufficiently significant only if it entails an opposition to all militarism (or is otherwise broad in scope). In *Zolfagharkhani*, the Court of Appeal indicated that a claimant's objection may be entitled to respect even if it is more specific: where the claimant did not object to military service in general or to the particular conflict, but was opposed to the use of a particular category of weapon (namely, chemical weapons), the Court found his objection to be reasonable and valid.[79] Similarly, the Trial Division has held that a claimant may object to serving in a particular conflict, rather than objecting to military service altogether, and may still be a Convention refugee.[80]

This is not to say that any narrow or limited objection of conscience will suffice. The objection may be regarded as sufficiently serious if the military actions objected to are judged by the international community to be contrary to basic rules of human conduct.[81] However, a

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[77] See also paragraphs 170 to 174 of the UNHCR *Handbook*.

[78] *Popov*, *supra*, footnote 68, at 244. See also *Tkachenko, Alexander v. M.C.I.* (F.C.T.D., no. IMM-802-94), McKeown, March 27, 1995, at 4.

[79] *Zolfagharkhani, supra*, footnote 23, at 553-555.

[80] *Ciric v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 65 (T.D.). In *Hophany, Parwiz v. M.E.I.* (F.C.T.D., no. A-802-92), Jerome, July 19, 1994, at 3-4 there appears what might be a statement to the contrary. However, the exact meaning of the statement is uncertain and, in any event, the views expressed by the Court of Appeal in *Zolfagharkhani, supra*, footnote 23 - which was not mentioned in *Hophany* - must take precedence.

[81] *Zolfagharkhani, supra*, footnote 23, at 555. See also: *Diab, supra*, footnote 40, at 3 (possible crimes against humanity); and *Ciric*, *supra*, footnote 80, at 74-8. It is not enough for the claimant to show that a particular conflict has been condemned by the international community; it must also be the case that his refusal to participate was based on the condemnation: *Sladoljev*, *supra* footnote 76, at 4. And there must be a reasonable chance that the claimant would indeed be required to participate in the objectionable operations: *Zolfagharkhani, supra*, footnote 23, at 547-548; *Velickovic, Slobodan v. M.C.I.* (F.C.T.D., no. IMM-4394-94), Richard, May 11, 1995, at 2 and 3.

Pronouncements from organizations such as Amnesty International, Helsinki Watch, and the Red Cross may constitute condemnation by the world community; condemnation by the United Nations is not necessary: *Ciric*, *supra*, footnote 80, at 75.

military's operations are not to be characterized as contravening international standards if there are only isolated violations of those standards. Instead, there must be offending military activity by the military forces which is condoned in a general way by the state.[82]

The serious harm that is a requisite for persecution may be found in the forcing of the claimant to perform military service; where reasons of conscience are involved, there is also a violation of the claimant's freedom of conscience; where military actions violate international standards, the claimant might be forced into association with the wrongdoing.[83] One must also bear in mind that some conscription activities may be extra-legal, and may therefore lack any basis for claiming to constitute legitimate exercises of state authority. An organization may have *de facto* authority and an ability to coerce persons into performing military service, yet not be a legitimate government, and have no right to conscript.[84]

If a call-up for military service would not necessarily result in the claimant's being compelled to perform military service, the injury to the claimant's interests is less, and the legitimacy of the demands placed on the claimant by the state looms large. Therefore, where objections of conscience may enable the claimant to obtain an exemption from service, or assignment to alternative service (i.e., non-military service, or non-combat service, or service outside a particular theatre of operations), the conscription law may not be inherently persecutory.[85]

Nor is there persecution if the penalties for refusing to serve are not harsh,[86] except perhaps where the refusal to serve occurs in the context of a military operation condemned as

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A non-defensive incursion into foreign territory is military activity that violates basic international standards, and United Nations condemnation of such an incursion is condemnation of the incursion as contrary to basic rules of human conduct: *Al-Maisri, Mohammed v. M.E.I.* (F.C.A., no. A-493-92), Stone, Robertson, McDonald, April 28, 1995, at 3-4.

[82] *Popov, supra*, footnote 68, at 245. There must be a probability, and not merely a possibility, that the military will engage in the offending activity: *Hashi, Haweya Abdinur v. M.C.I.* (F.C.T.D., no. IMM-2597-96), Muldoon, July 31, 1997, at 5, alluding to page 555 of *Zolfagharkhani*.

[83] *Zolfagharkhani, supra*, footnote 23, at 555.

[84] *Diab, supra*, footnote 40, at 2-3.

[85] *Talman, Natalia v. S.G.C.* (F.C.T.D., no. IMM-5874-93), Joyal, January 11, 1994, at 7. See also: *Popov, supra*, footnote 68, at 244-5; *Frid, Mickael v. M.C.I.* (F.C.T.D., no. IMM-6694-93), Rothstein, December 15, 1994, at 3.

[86] *Frid, ibid.*, at 3. See also *Baranchook, Peter v. M.C.I.* (F.C.T.D., no. IMM-876-95), Tremblay-Lamer, December 20, 1995; and *Moskvitchev, Vitalli v. M.C.I.* (F.C.T.D., no. IMM-70-95), Dubé, December 21, 1995, where the Court upheld decisions of Post-Claim Determination Officers (PCDOs). In *Baranchook*, at 4, the PCDO compared the Israeli penalty for refusing to serve with international standards, and concluded that the penalty was neither excessive nor draconian. In *Moskvitchev*, at 3, the PCDO found that a sentence of six months to five years for draft evasion in Moldova would not be inhuman [*sic*] or extreme. [Section 2(1) of the *Immigration Regulations* speaks of "inhumane treatment" and "extreme sanctions".]

contrary to basic rules of human conduct.[87] The Refugee Division must consider the actual practice in the treatment of deserters, and not just the penalty prescribed by law.[88]

Somewhat akin to the idea that the claimant would not be persecuted if he would not be forced into military activity is the notion that the Refugee Division should not endorse an objection to compulsory military service in the country of reference if the claimant chose to immigrate to that country, knowing that compulsory service existed there.[89]

9.3.7. One-Child Policy of China

The People's Republic of China has a policy which, subject to exceptions, restricts each couple to having one child. A variety of sanctions is used in attempts to secure compliance with the policy.

The Canadian courts have generated three leading decisions regarding this matter. In the earliest of the three, *Cheung*,[90] the Court of Appeal declared the claimants to be Convention refugees: they were a woman who was facing forced sterilization, and her minor daughter who had been born in violation of the policy. *Cheung* was a unanimous decision of three judges.

Next came the Court of Appeal's decision in *Chan*,[91] where the majority found against a man who was allegedly facing forced sterilization. Two judges (Heald and Desjardins, JJ.A.) constituted the majority; the third (Mahoney J.A.), who had also been part of the bench in *Cheung*, dissented. Each of the three Court of Appeal judges in *Chan* produced a separate set of reasons, and there were significant differences even between the two majority decisions. It should be noted that the Supreme Court's ruling in *Ward*[92] came out after *Cheung* but before *Chan* (F.C.A.). The Court of Appeal in *Chan* considered both *Cheung* and *Ward*.

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[87] In *Al-Maisri, supra,* footnote 81, the claimant had deserted from an army which was participating in an operation condemned as contrary to basic rules of human conduct, and the Court noted that "the punishment for desertion which would likely be visited upon the [claimant] ..., *whatever that punishment might be,* would amount to persecution." (at 3, emphasis added).

[88] *Moz, Saul Mejia v. M.E.I.* (F.C.T.D., no. A-54-93), Rothstein, November 12, 1993. Reported: *Moz v. Canada (Minister of Employment and Immigration)* (1993), 23 Imm. L.R. (2d) 67 (F.C.T.D.). See also *Moskvitchev, supra*, footnote 86, at 3.

[89] *Talman, supra*, footnote 85, at 6; *Kogan, Meri v. M.C.I.* (F.C.T.D., no. IMM-7282-93), Noël, June 5, 1995, at 5 and 7. The operative idea seems to be that the claimant should be considered bound by his own voluntary decision. However, the fact that the claimant chose to immigrate despite knowing of compulsory service might also raise a question as to the strength (or even genuineness) of his conviction.

On the other hand, see *Agranovski, Vladislav v. M.C.I.* (F.C.T.D., no. IMM-2709-95), Tremblay-Lamer, July 3, 1996, at 5: at the time of immigrating to Israel, the claimant had known that there was compulsory military service, and the Refugee Division therefore did not believe he had reasons of principle for refusing to serve; however, the Court overturned this conclusion, noting that the claimant had been brought to the country as a minor by his parents, and that he had thought he would be able to avail himself of alternative service.

[90] *Cheung, supra,* footnote 27.

[91] *Chan* (F.C.A.), *supra*, footnote 29.

[92] *Ward, supra*, footnote 18.

Chan (F.C.A.) was appealed, yielding the third of the principal authorities, the decision of the Supreme Court in *Chan*.[93] Again there was a split decision: by a four-to-three majority, the Court dismissed the appeal, affirmed the decisions of the Court of Appeal and Refugee Division, and found against the appellant (claimant).

The crux of the judgment of the Supreme Court majority (per Major J.) was that the evidence was inadequate to make out the claimant's allegations - notably, his allegation that there was a serious possibility he would be physically coerced into undergoing sterilization. Apart from recording views expressed by the Court of Appeal in *Chan* (including views concerning *Cheung* and *Ward*), Mr. Justice Major declined to discuss, or rule on, certain legal issues which had occupied that lower court in this case: e.g., whether forced sterilization constitutes persecution; whether the claim involved a particular social group; and whether the claimant's having a second child was to be construed as an act which expressed a political opinion (or an act which would be perceived by the authorities as the expression of a political opinion).

The Supreme Court's dissenting minority (per La Forest J.) had a different appreciation of the evidence, and would have left it to the Refugee Division to perform a further assessment of the evidence; however, in finding that the appeal should be allowed, the minority also addressed some of the legal issues which the majority had bypassed. The minority's comments on these issues carry considerable persuasive authority, inasmuch as they were not contradicted by the majority, and represent the views of a significant number of Supreme Court justices; furthermore, insofar as these comments are an explanation of the *Ward* decision, it must be noted that the explanation was provided by the author of that decision, Mr. Justice La Forest.

Further particulars of these three leading decisions are set forth in the material that follows.

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In the context of claims involving the one-child policy, the Court of Appeal has reiterated that all elements of the Convention refugee definition must be present. Thus, it has been noted that, where the claim concerns the breach of a valid policy, abhorrence of the penalty, or the presence of a well-founded fear of persecution, does not justify a finding that the claimant is a Convention refugee; it is also necessary that the punishment be for a Convention reason.[94] Conversely, if a link to a Convention ground is established, the claimant must still show that he or she has a well-founded fear of persecution.[95]

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[93] *Chan* (S.C.C.), *supra,* footnote 31.

[94] *Chan* (F.C.A.), *supra*, footnote 29 at 690, 692-693 and 696, per Heald J.A.

[95] *Cheung, supra,* footnote 27, at 322. See also *Chan* (S.C.C.), *supra,* footnote 31, per Major J. at 657. The Supreme Court noted that, for the claim to succeed, evidence must show both that there is a subjective fear and that the fear is "objectively well-founded" (per Major J., at 659). According to the Court, the evidence did not establish a serious possibility that certain harm would be inflicted - i.e., did not establish an objective basis (per Major J., at 666). The Court also had doubts as to whether subjective fear was made out (per Major J., at 664).

On the issue of serious harm, both in *Cheung* and in *Chan* (F.C.A.) it was held that the anticipated mistreatment qualified. Thus, forced or strongly coerced[96] sterilization constitutes persecution, whether the victim is a woman[97] or a man.[98] In *Cheung*, Linden J.A. explained this conclusion as follows:[99]

> Even if forced sterilization were accepted as a law of general application, that fact would not necessarily prevent a claim to Convention refugee status. Under certain circumstances, the operation of a law of general application can constitute persecution. In *Padilla* ..., the Court held that a Board must consider extra-judicial penalties which might be imposed. Similarly, in our case, the appellant's fear is not simply that she may be exposed to the economic penalties authorized by China's one child policy. That may be acceptable. Rather, the [claimant], in this case, genuinely fears forced sterilization; her fear extends beyond the consequences of the law of general application to include extraordinary treatment in her case that does not normally flow from that law ... Furthermore, if the punishment or treatment under a law of general application is so Draconian as to be completely disproportionate to the objective of the law, it may be viewed as persecutory. This is so regardless of whether the intent of the punishment or treatment is persecution. Cloaking persecution with a veneer of legality does not render it less persecutory. Brutality in furtherance of a legitimate end is still brutality.
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> The forced sterilization of women is a fundamental violation of basic human rights ... The forced sterilization of a woman is a serious and totally unacceptable violation of her security of the person. Forced sterilization subjects a woman to cruel, inhuman and degrading treatment... I have no

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[96] "Physical compulsion is not the only mechanism for forcing a person to do something which they would not of their own free choice choose to do": *Liu, Ying Yang v. M.C.I.* (F.C.T.D., no. IMM-4316-94), Reed, May 16, 1995, at 3. The claimant had been subjected to "incredible pressure": her work unit, and she herself and her husband, would have incurred fines if she had had a second child; also, on two occasions a member of the work unit had accompanied her to a hospital where she was to undergo sterilization. Such pressure amounts to "forcing", as does denying a person 80% of his salary (at 2-3).

Compare *Chan* (S.C.C), *supra*, footnote 31, per Major J., at 667: "... the [claimant] failed to provide ... evidence to substantiate his claim that the pressure from the Chinese authorities to submit to sterilization would extend beyond psychological and financial pressure to actual physical coercion." It is unclear whether Mr. Justice Major (i) was of the view that psychological and financial pressure could not constitute forcing (and could not constitute persecution), or (ii) was simply focusing upon the specific allegation made by the appellant (namely, that he would be physically coerced), or (iii) did not think the particular psychological and financial pressures confronting this claimant would be severe enough to constitute persecution. Interpretation (i) might be a dubious one, given that Major J. did not clearly assert this view, and did not present a discussion of the issue.

[97] *Cheung, supra*, footnote 27, at 322-325.

[98] *Chan* (S.C.C.), *supra*, footnote 31, per La Forest J. (dissenting) at 636. The majority in the Supreme Court did not expressly comment on the issue, although Mr. Justice Major appeared to assume that forced sterilization would indeed constitute persecution: see, for example, 658 and 672-3. See also *Chan* (F.C.A.), *supra*, footnote 29, per Heald J.A. at 686, and per Mahoney J.A. (dissenting) at 704.

[99] *Cheung, supra*, footnote 27, at 323-324. For a Supreme Court response to the "legitimate end" argument - a response complementing that of Linden J.A. in *Cheung, supra*, footnote 27 - see the remarks of La Forest J. (dissenting), at 631-632 in *Chan* (S.C.C.), *supra*, footnote 31.

> doubt, then, that the threat of forced sterilization can ground a fear of persecution within the meaning of Convention refugee under the *Immigration Act*.

In *Chan* (S.C.C.), Mr. Justice La Forest, in dissent, stated:

> ... [W]hatever technique is employed, it is utterly beyond dispute that forced sterilization is in essence an inhuman and degrading treatment involving bodily mutilation, and constitutes the very type of fundamental violation of basic human rights that is the concern of refugee law.[100]

The Trial Division has held that forced abortion, being an invasion of a woman's body, is equivalent to or worse than forced sterilization and, accordingly, constitutes persecution.[101]

Regarding the requirement that the fear of persecution be well founded, the Trial Division observed that the issue was not whether the female claimant had been forced to undergo an abortion in the past, but instead whether there was a reasonable chance she would be forced to undergo one if returned to China.[102]

Nexus was the principal area of disagreement between *Cheung* and *Chan* (F.C.A.). The two cases offered quite different views on the issue of whether the feared sterilization would be inflicted by reason of a Convention ground. *Cheung* held that there was a targeted social group;[103] the majority in *Chan* (F.C.A.) found otherwise.[104] Speaking for the majority in *Chan* (S.C.C.), Mr. Justice Major chose not to address the question of whether the case involved a particular social group.[105] However, La Forest J. (dissenting) held that "[p]ersons such as the appellant, if persecuted on the basis of having had more than one child, would be able to allege membership in a particular social group".[106] Please refer to Chapter 4 for a fuller description of the views of the Supreme Court of Canada regarding particular social group.

Political opinion is another ground which might be invoked with respect to the one-child policy. However, in *Chan* (F.C.A.), Heald J.A. ruled that the authorities' reaction to the

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[100] *Chan* (S.C.C.), *supra*, footnote 31, per La Forest J. (dissenting) at 636.

[101] *Lai, Quang v. M.E.I.* (F.C.T.D., no. IMM-307-93), McKeown, May 20, 1994, at 2.

[102] *Lai, ibid.*, at 3. In *Liu*, *supra*, footnote 96, the Court noted there was no evidence that the adult claimants, who had had a second child while in Canada, still objected to the family planning policy or methods of the Chinese government; on this basis, the Court held that evidence of subjective fear was lacking (at 3-4). See also *Cheng, Kin Ping v. M.C.I.* (F.C.T.D., no. IMM-176-97), Tremblay-Lamer, October 8, 1997, at page 2: the male claimant had no reason to fear persecution for violation of the family planning policy, since his wife had already been sterilized (following the birth of one child and a subsequent forced abortion).

[103] *Cheung, supra*, footnote 27, at 322.

[104] *Chan* (F.C.A.), *supra*, footnote 29, per Heald J.A. at 690-3, and per Desjardins J.A. at 716-21. In his dissent, Mahoney J.A. rejected one delineation of a particular social group, but accepted another, at 705.

[105] *Chan* (S.C.C.), *supra*, footnote 31, per Major J. at 658 and 673.

[106] *Chan* (S.C.C.), *supra*, footnote 31, per La Forest J. (dissenting) at 646.

claimant's non-compliance would not be by reason of political opinion;[107] and Desjardins J.A. was apparently inclined toward the same conclusion.[108]

In *Cheng*, while the claimant pointed to a social group ("those who violated Chinese government family planning policy"), religion also figured in the story. The claimant was a Roman Catholic, and it had been his religious beliefs that had prompted him to oppose the policy.[109]

9.3.8. Religious or Cultural Mores

Every society has limits on what it regards as acceptable behaviour. In some countries, the norms of the society (or the norms laid down by some ruling group) may be more constraining than elsewhere. The norms may interfere with the exercise of human rights, and may impose limitations on certain categories of people - categories which may be defined by Convention-protected characteristics. These restrictions may be entrenched in law, and may be backed up by coercive action and penalties. A claimant who transgresses the conventions of his or her homeland (and perhaps, at the same time, violates the law) may be at risk of serious harm.

When dealing with the norms of other societies, the Refugee Division should bear in mind that an application of the Convention refugee definition involves measuring the claimant's situation, and any actions visited upon the claimant, against human rights standards which are international (and which may sometimes be interpreted by reference to Canadian law). It is not appropriate simply to defer to the notions of propriety favoured by the majority or the rulers in the claimant's homeland. In this regard, reference should be made to Chapter 3, Section 3.1.1.1.[110]

Among the claims which concern societal norms are those of women who face restrictions associated with religion or tradition, and those of Ahmadis from Pakistan.

9.3.8.1. Restrictions upon Women

Regarding the seriousness of harm, the Trial Division has termed female circumcision a "cruel and barbaric practice", a "horrific torture", and an "atrocious mutilation".[111]

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[107] *Chan* (F.C.A.), *supra*, footnote 29, at 693-696, per Heald J.A.

[108] *Chan* (F.C.A.), *supra*, footnote 29, at 721-723, per Desjardins J.A. Compare *Kwong, Kam Wang (Kwong, Kum Wun) v. M.C.I.* (F.C.T.D., no. IMM-3464-94), Cullen, May 1, 1995, at 5.

When *Chan* came before the Supreme Court, both the majority and the minority declined to decide whether the claimant's action of having a second child "was sufficiently expressive of a political opinion to independently found a refugee claim": per Major J., at 672; per La Forest J. (dissenting), at 648-649. Mr. Justice La Forest thought the evidence pointed to other possible connections to political opinion (at 647-8). However, His Lordship's broaching of these possibilities and his reading of the evidence were disapproved of by Mr. Justice Major (at 671-2).

[109] *Cheng*, at page 2.

[110] Also see the reference to *Daghighi* in footnote 29, above.

[111] *Annan v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 25 (T.D.). See also *Sanno, Aminata v. M.C.I.* (F.C.T.D., no. IMM-2124-95), Tremblay-Lamer, April 25, 1996.

In *Namitabar*, the Trial Division held that punishment under an Iranian law requiring women to wear the *chador* may constitute persecution. The Court noted that the penalty would be inflicted without procedural guarantees, and that the penalty was disproportionate to the offence.[112] In *Fathi-Rad*, another case involving the Iranian dress code, the Trial Division found that the treatment accorded the claimant for purely minor infractions of the Islamic dress code in Iran was completely disproportionate to the objective of the law.[113] On the other hand, in *Hazarat,*[114] the Trial Division upheld a finding that restrictions imposed on women by laws and practices under the Mujahadeen government in Afghanistan (including restrictions concerning dress, movement outside the home, travel, education and work) amounted to discrimination only, not persecution.

In *Vidhani*, the claim of an Asian, Moslem woman from Kenya derived from the fact that her father had arranged a marriage for her. She did not wish to marry the man in question, and feared that this man would abuse her if they did marry. She also feared being abused by her father if she refused to marry and being sexually attacked by the police if she complained to them. The Trial Division stated that women who are forced into marriages have had a basic human right violated.[115] It also referred to the possibility that persecution might be found in: (i) the claimant's being forced into a marriage; (ii) spousal abuse; (iii) abuse by the father; and (iv) the reaction of the police.[116]

In *Ameri,*[117] the claimant, a woman who disliked the Iranian dress code, urged that women were victims of the means by which the code was enforced. In response, the Trial Division said:

> There was not evidence that her activities and commitments or beliefs would challenge the policies and laws of Iran, if she were to return, in a manner that might result in retributive action by the state that would constitute

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[112] *Namitabar* (T.D.), *supra*, footnote 21, at 47. In *Namitabar* (F.C.A), the Court overturned the Trial Division on the basis that the CRDD credibility findings were not ambiguous. With respect to the issue of wearing veils in Iran, the Court was of the view that "the Refugee Division may have expressed itself incorrectly [but] that has no importance in the case at bar since the female [claimant] voluntarily complied with the clothing code and did not even display reluctance to do so..."

[113] *Fathi-Rad, supra,* footnote 21, at 4-5. In *Rabbani*, supra, footnote 34, the Refugee Division had concluded that a violation of Iran's Islamic dress code could not form the basis of a well-founded fear of persecution. It had noted the dress conventions applicable to various groups elsewhere, had indicated that such conventions did not involve violations of basic human rights, and had said that the same was true of the Iranian dress code. The Court observed (at page 2) that, in making these comparisons, the Refugee Division had "... ignored, failed to appreciate or trivialized the persecutory aspects of the Islamic dress code ..." Furthermore, the Refugee Division had failed to acknowledge documentary evidence regarding the penalties for failure to comply with the code.

[114] *Hazarat, Ghulam v. S.S.C.* (F.C.T.D., no. IMM-5496-93), MacKay, November 25, 1994, at 2-4.

[115] *Vidhani v. Canada (Minister of Citizenship and Immigration),* [1995] 3 F.C. 60, (T.D.), at 65.

[116] *Vidhani*, ibid., at 62 and 65-66. See also *Sanno*, supra, footnote 111; *Gwanzura, Unity v. M.C.I.* (F.C.T.D., no. IMM-1907-96), Heald, July 10, 1997, at 4 (wife substitution); and *Fofanah, Isha v. M.C.I.* (F.C.T.D., no. IMM-4795-97), Muldoon, July 16, 1998 (a brute who rapes a woman is certainly not following traditional customary practices).

[117] *Ameri, Ghulamali v. M.C.I.* (F.C.T.D., no. IMM-3745-94), MacKay, January 30, 1996.

> persecution. Her expressed fear was thus found not to be objectively based. I am not persuaded that the tribunal's conclusion on this aspect of her claim was unreasonable.[118]

In the same vein, or in a very similar vein, was the *Pour* case.[119] There it was argued that all women resident in a state who disagree with gender-specific discriminatory rules, such as the Iranian dress code for women, suffer from persecution. The Trial Division observed that this proposition went substantially beyond its decisions in *Namitabar*[120] and *Fathi-Rad*,[121] which concerned women who had engaged in a series of acts of defiance and had suffered punishments as a result.

This would appear to mean that a claim will fail if the claimant has not demonstrated, via past conduct, a readiness to assert some right and thereby express dissent (or if the claimant's dissenting conduct has not resulted in mistreatment of the claimant). On the other hand, the Court has also considered it improper to effectively require that the claimant buy peace for herself by refraining from the exercise, or acquiescing in the denial, of one of her basic rights.[122]

Regarding nexus, the Trial Division has said that a law which specifically targets the manner in which women dress may not properly be characterized as a law of general application which applies to all citizens.[123] A woman's breach of a dress code may be perceived as a display of opposition to a theocratic regime.[124]

In *Vidhani*, the Trial Division found that the claimant belonged to a particular social group consisting of women forced into arranged marriages without their consent. It also referred to

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[118] *Ameri*, ibid., at 9.

[119] *Pour, Malek Mohammad Nagmeh Abbas v. M.C.I.* (F.C.T.D., no. IMM-3650-95), Gibson, June 6, 1996, at 5-7.

[120] *Namitabar*(T.D.), *supra*, footnote 21. In *Namitabar* (F.C.A), the Court overturned the Trial Division on the basis that the CRDD credibility findings were not ambiguous. With respect to the issue of wearing veils in Iran, the Court was of the view that "the Refugee Division may have expressed itself incorrectly [but] that has no importance in the case at bar since the female [claimant] voluntarily complied with the clothing code and did not even display reluctance to do so..."

[121] *Fathi-Rad, supra,* footnote 21.

[122] *Ali, Shaysta-Ameer, supra*, footnote 9, at 2. One of the claimants was a nine-year-old girl who could have avoided persecution only by refusing to go to school, and thus forswearing the basic human right to an education. The Court considered her to be a Convention refugee. In a rather different context, the Court again indicated that the Refugee Division must not expect a claimant to buy peace for herself with an unconscionable self-denial (namely, continuing to lie about her lack of religious inclinations): *Kazkan, Shahrokh Saeedi v. M.C.I.* (F.C.T.D., no. IMM-1313-96), Rothstein, March 20, 1997, at 2-3.

[123] *Fathi-Rad, supra,* footnote 21, at 4. See also *Namitabar, supra*, footnote 21, at 46.

[124] *Namitabar* (T.D.), *ibid.*, at 49. In *Fathi-Rad, supra,* footnote 21, the Convention ground invoked for the part of the claim pertaining to the dress code appears to have been membership in a particular social group; the social group in question was not expressly named in the Court's reasons. In *Namitabar* (F.C.A), *supra*, footnote 21, the Court overturned the Trial Division on the basis that the CRDD credibility findings were not ambiguous. With respect to the issue of wearing veils in Iran, the Court was of the view that "the Refugee Division may have expressed itself incorrectly [but] that has no importance in the case at bar since the female [claimant] voluntarily complied with the clothing code and did not even display reluctance to do so..."

another alleged particular social group: "Asian women in Kenya". The Court observed that *Ward*'s category (1) (groups defined by an innate or unchangeable characteristic) seemed applicable to the claimant's circumstances.[125]

In *Ali, Shaysta-Ameeri*, the Refugee Division held that an adult claimant belonged to a group consisting of educated women. The Trial Division apparently considered her nine-year-old daughter to be a member of the same - or a similar - group.[126]

In *Annan*, a Christian woman was faced with the possibility of being forcibly circumcised by "Moslem fanatics", at the instigation of a Moslem man who wished to marry her. The claimant cited religion as the basis for her difficulties[127] and the Court held that the Refugee Division had erred in rejecting her claim, but the Court did not discuss the nexus issue.

With respect to state protection, in *Annan* the Court found that the claimant could not count on state protection against forcible circumcision: one must consider not only the state's ability to protect but also its willingness; and while the Ghanaian government had sometimes shown an intention to make female circumcision illegal, it had not yet done this, it was still tolerating the practice, and pious vows were not reassuring. The Court also noted that the claimant would be returning to Ghana alone, as she had been unable to locate her parents.[128]

For additional guidance regarding claims by women who transgress conventions of their homelands, see *Women Refugee Claimants Fearing Gender-Related Persecution: Update*, issued by the Chairperson pursuant to section 65(3) of the *Immigration Act*, November 25, 1996.

9.3.8.2. Ahmadis from Pakistan

In Pakistan, legislation prohibits persons belonging to the Ahmadi religious group from engaging in certain activities (activities connected with the practice of their religion or with their religious identification), and establishes penalties for violations of the prohibitions. One of the statutes concerned is known as Ordinance XX.

The Trial Division has said that mere existence of an oppressive law (Ordinance XX) which is enforced only sporadically does not by itself show that all members of the group targeted by the law (Ahmadis) have good grounds for fearing persecution.[129]

In *Ahmad, Masroor*,[130] the claimant had wished to argue before the Refugee Division that, given the nature of Ordinance XX, the simple existence of that law meant the claimant was

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[125] *Vidhani, supra*, footnote 115, at 64-65 and 67. See also *Gwanzura, supra*, footnote 116, at 2.

[126] *Ali, Shaysta-Ameer, supra*, footnote 9, at 1-2 .

[127] *Annan, supra*, footnote 111. See also *Gwanzura, supra,* at 2.

[128] *Annan, ibid.*, at 31. The issue of state protection was touched upon in *Vidhani, supra*, footnote 115 as well, at 66-67. The Court found that the Refugee Division had not dealt adequately with the issue, and in particular with the claimant's explanation for not having sought police assistance.

[129] *Butt, supra*, footnote 58; see also *Thathaal, Sabir Hussain v. S.S.C.* (F.C.T.D., no. A-1644-92), McKeown, December 15, 1993.

persecuted. The Court acknowledged that it would be proper for the claimant to put forward such an argument (although, based on an evidentiary consideration, the Court also cast some doubt on the argument's ability to succeed).

In *Rehan*,[131] the Refugee Division agreed with the following statement, taken from the judgment of the English Court of Appeal in *Ahmad and others v. Secretary of State for the Home Department*[132]:

> ... It has been accepted by ... the Secretary of State, that the Ordinance, by itself, was well capable of being regarded as discrimination against all members of the Ahmadi sect; but in my judgment the proposition that it was by itself capable of making the appellants liable to persecution simply by virtue of being members of the sect is quite unsustainable. The only members of the sect potentially liable to persecution would be those who proposed to act in contravention of its provisions. Nothing in the Ordinance prevented persons from holding the belief of the sect, without engaging in any of the specified prohibited activities.
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> ...
>
> It was apparent to the Secretary of State ... that most Ahmadis live ordinary lives, untroubled by the Government despite the existence of the Ordinance. In my judgment he would have been fully entitled to assume that if the appellants, on returning to Pakistan, would intend to disobey the Ordinance and such intention constituted the reason, or a predominant reason, for their stated fear, they would have said so ...

It would appear that the Trial Division held that it was reasonably open to the Refugee Division to rely on this analysis, but stopped short of holding that the analysis was correct.[133] Furthermore, the Trial Division indicated that if the applicant had stated or demonstrated an intention to violate Ordinance XX, and if his past conduct had been consistent with this intention, he might very well have established a claim.[134]

In *Ahmed*,[135], the Trial Division observed that "... the Federal Court of Canada nas not yet clearly decided whether the discriminatory laws of Pakistan are indeed persecutory in relation to Ahmadis. It has preferred to adopt a case-by-case analysis of refugee claimants' prospective fears of persecution." (Footnote omitted.) In the Trial Division, the Minister conceded that the Refugee Division had erred in finding that the episodes of mistreatment experienced by the claimant did not constitute past persecution; however, the Trial Division upheld the further conclusion that there was no reasonable chance of persecution.

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[130] *Ahmad, Masroor v. M.E.I.* (F.C.T.D., no. A-555-92), Rothstein, June 16, 1994, at 3-5 and 9.

[131] *Rehan, Muhammad Arif v. M.C.I.* (F.C.T.D., no. A-580-92), Gibson, October 18, 1996.

[132] [1990] Imm. A.R. 61 (Eng.C.A.). Quoted in *Rehan, ibid.*, at 3.

[133] *Rehan, supru*, footnote 131: see in particular the bottom of page 4, the top of page 5, and page 6.

[134] *Rehan, ibid.*, at 6, and also at 5.

[135] *Ahmed, Irfan v. M.C.I.* (F.C.T.D., no. IMM-2725-96), Joyal, July 4, 1997, at 5

In *Mehmood*,[136] the Trial Division found that the Refugee Division had erred in restricting its analysis to whether or not the claimant was a registered or official member of the Ahmadi religion. On the basis of the evidence before it, the Refugee Division was required to determine whether or not the claimant had a well-founded fear of persecution arising from the perception that he was a member of the Lahori Ahmadi religion.

9.4. INDIRECT PERSECUTION AND FAMILY UNITY

The concept of "indirect persecution" was described by Mr. Justice Jerome in *Bhatti*[137] as follows:

> The concept of indirect persecution is premised on the assumption that family members are likely to suffer great harm when their close relatives are persecuted. This harm may manifest itself in many ways ranging from the loss of the victim's economic and social support to the psychological trauma associated with witnessing the suffering of loved ones.
>
> ...
>
> The theory is based on a recognition of the broader harm caused by persecutory acts. By recognizing that family members of persecuted persons may themselves be victims of persecution, the theory allows the granting of status to those who might otherwise be unable to individually prove a well-founded fear of persecution.

However, in *Pour-Shariati*, Mr. Justice Rothstein said that "the *Bhatti* approach to indirect persecution unjustifiably broadens the Convention refugee basis for admission to Canada, to include persons who do not have a well-founded fear of persecution in their own right."[138] Furthermore, in *Casetellanos*, Mr. Justice Nadon noted that

> ... there must be a very clear link between a refugee claimant and one of the five prescribed grounds in the Convention refugee definition. However, the principal of indirect persecution does not require the claimant to have a well-founded fear of persecution or to be persecuted; indirect persecution arises out of the fact that the claimant is the unwilling spectator of some incidents of violence targeted against other members of the family or the social group to which he or she belongs, for example.

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[136] *Mehmood, Nasir v. M.C.I.* (F.C.T.D., no. IMM-2256-97), McGillis, May 14, 1998.

[137] *Bhatti, Naushaba v. S.S.C.* (F.C.T.D., no. A-89-93), Jerome, September 14, 1993. Reported: *Bhatti v. Canada (Secretary of State)*. (1994), 25 Imm. L.R. (2d) 275 (F.C.T.D.), at 278-279. See also *Arguello-Garcia, Jacobo Ignacio v. M.E.I.* (F.C.T.D., no. 92-A-7335), McKeown, June 23, 1993. Reported: *Arguello-Garcia v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 285 (F.C.T.D.), at 287-8 - although this case was the subject of conflicting interpretations in *Bhatti* on the one hand and *Pour-Shariati v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 767 (T.D.) and *Rafizade, Rahi v. M.C.I.* (F.C.T.D., no. IMM-2570-94), Cullen, March 7, 1995. Reported: *Rafizade v. Canada (Minister of Citizenship and Immigration)* (1995), 30 Imm. L.R. (2d) 261 (F.C.T.D.) on the other.

[138] *Pour-Shariati, supra*, footnote 137, at 772-3. Rothstein J. certified a question as to whether indirect persecution constitutes a basis for a claim.

> Furthermore, in *Bhatti*, ... Jerome A.C.J. held that the scope of the principle was such that it could extend beyond traditional grounds of persecution to support or economic considerations ...
>
> In my opinion, such an extension of the so-called principle of indirect persecution is unacceptable as lack of economic, monetary or emotional support do not constitute a ground for being found a Convention refugee. It would therefore be surprising if the principle of indirect persecution could subsume such a concept. ...[139]

Nadon J. went on to hold that "indirect persecution does not constitute persecution within the meaning of the definition of Convention refugee."[140]

The Court of Appeal has now dealt with and dismissed the appeal in *Pour-Shariati*,[141] and in so doing it has squarely rejected the concept of indirect persecution that was articulated in *Bhatti*:

> We accordingly overrule *Bhatti*'s recognition of the concept of indirect persecution as a principle of our refugee law. In the words of Nadon, J. in *Casetellanos* ..., "since indirect persecution does not constitute persecution within the meaning of Convention refugee, a claim based on it should not be allowed." It seems to us that the concept of indirect persecution goes directly against the decision of this Court in *Rizkallah* ..., where it was held that there had to be a personal nexus between the claimant and the alleged persecution on one of the Convention refugee grounds. One of these grounds is, of course, a " membership in a particular social group," a ground which allows for family concerns in on [*sic*] appropriate case.

Following *Pour-Shariati*, Muldoon, J. rejected the concept of indirect persecution in *Cetinkaya* [142] and held, on the facts in that case, that there had to be a nexus between the claimant and the general situation in his country, Turkey, regarding members of the PKK. He stated as follows:

> [25] ... While certain members of the PKK may face persecution, it is for the [claimant] to demonstrate that he falls within that class of individuals

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[139] *Casetellanos v. Canada (Solicitor General)*, [1995] 2 F.C. 190 (T.D.), at 206-207.

[140] *Casetellanos*, *ibid.*, at 207. See also *Vyramuthu, Sanmugarajah v. S.G.C.* (F.C.T.D., no. IMM-6277-93), Rouleau, January 26, 1995, at 4. On the other hand, in *Nina, Razvan v. M.C.I.* (F.C.T.D., no. A-725-92), Cullen, November 24, 1994, the Court, at 9, seems to have considered the mistreatment of the child, who was kidnapped in order to put pressure on his father, to be persecution of the father. In *Hashmat, Suhil v. M.C.I.* (F.C.T.D., no. IMM-2331-96), Teitelbaum, May 9, 1997, Mr. Justice Teitelbaum noted (at pages 4-5) that earlier cases had rejected the principle of indirect persecution. However, he indicated that, where the Refugee Division was dealing with "the separate issue" of whether a the claimant would undergo undue hardship in journeying to a potential internal refuge (this issue being a subset of the "reasonableness" branch of the IFA test), relevance attached to the potential hardship of the wife and daughter who would accompany him on the journey: at page 5.

[141] *Pour-Shariati, Dolat v. M.E.I.* (F.C.A., no. A-721-94), MacGuigan, Robertson, McDonald, June 10, 1997. Reported: *Pour-Shariati v. Canada (Minister of Employment and Immigration)* (1997), 39 Imm. L.R. (2d) 103 (F.C.A.); affirming [1995] 1 F.C. 767 (T.D.).

[142] *Cetinkaya, Lukman v. M.C.I.* (F.C.T.D., no. IMM-2559-97), Muldoon, July 31, 1998.

> who may face persecution. It is not sufficient to adduce evidence that members of the PKK are being persecuted without providing the necessary link between the [claimant's] activities and the persecution feared. Even in the situation of a perceived political opinion, a link must be made between the applicant and the political opinion which may be attributed to him.

A claim based on indirect persecution may be distinguished from one based on the principle of "family unity".[143] That principle is discussed in paragraphs 182 to 185 of the UNHCR *Handbook*. The family-unity claimant does not attempt to satisfy the definition's persecution requirement by pointing to side-effects. Instead, he or she takes the position that if

[143] A claim based on indirect persecution may also be distinguished from a claim based on (direct) persecution by reason of membership in a particular social group which consists of a certain family. In *Kaprolova, Elena v. M.C.I.* (F.C.T.D., no. IMM-388-97), Teitelbaum, September 25, 1997, judicial review was granted because the Refugee Division had mistaken a social-group claim for an indirect-persecution claim. See also Chapter 4, section 4.5 (in particular footnote 26).

the directly-attacked individual meets all criteria of the Convention refugee definition, a family member may be recognized as a Convention refugee regardless of whether the family member meets the definition's criteria (i.e., has a well-founded fear of persecution). This is a position which has been rejected as being without foundation in Canadian law.[144]

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[144] *Pour-Shariati, supra*, footnote 137, at 772-773 and 774-775; *Casetellanos, supra*, footnote 139, at 201-202; *Vyramuthu, supra*, footnote 140, at 3; *Busto, Nidia Graciela Saez de v. M.C.I.* (F.C.T.D., no. IMM-3704-94), Rothstein, February 16, 1995, at 3; *Rafizade, supra*, footnote 137, at 6; *Martinez, Oscar v. M.C.I.* (F.C.T.D., no. IMM-462-96), Gibson, June 6, 1996, at 3-4; *Aden, Ahmed Abdulkadir v. M.C.I.* (F.C.T.D., no. IMM-2912-95), MacKay, August 14, 1996. Reported: *Aden v. Canada (Minister of Citizenship and Immigration)* (1996), 35 Imm. L.R. (2d) 40 (F.C.T.D.), at 6; and *Addullahi, Isse Samatar v. M.C.I.* (F.C.T.D., no. IMM-3170-95), Gibson, November 4, 1996, at 6; *Dawlatly, George Elias George v. M.C.I.* (F.C.T.D., no. IMM-3607-97), Tremblay-Lamer, June 16, 1998, at page 5. But see *Ripalda, Alma v. M.C.I.* (F.C.T.D., no. IMM-455-98), McDonald, July 15, 1998, where the Court, without referring to jurisprudence stating that the principle of family unity is not a basis for granting Convention refugee status, indicated that the Refugee Division could have considered the claim under that principle.

Compare *Cheung, supra,* footnote 27, at 325, where the concept of family unity is mentioned without analysis; and see *Azofeifa, Kattia Perez v. M.C.I.* (F.C.T.D., no. IMM-1899-94), McKeown, December 21, 1994, at 4-5 and 6, as well as *S.S.C. v. Ilbeigi-Asli, Mehrbanou* (F.C.T.D., no. IMM-2766-94), McKeown, March 17, 1995, at 4.

Some cases apparently see little difference between the notion of indirect persecution and the principle of family unity: see *Pour-Shariati, supra*, footnote 137, 772-774, and *Rafizade, supra*, footnote 137, at 5-6. But note that since "family" may constitute a particular social group (see Chapter 4), a relative who is targeted, albeit as a secondary object of the persecutor's animosity, may base his or her claim on direct persecution by reason of membership in a particular social group.

CHAPTER 9

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CHAPTER 10

10. EXCLUSION CLAUSES

10.1. ARTICLE 1E

Article 1E of the Convention has been considered by the Federal Court in a number of cases. The interpretation of this provision is still evolving and it is not as clear as one would hope, therefore, paragraphs 144 to 146 of the UNHCR *Handbook* constitute a helpful starting point.

For this ground of exclusion to operate, a person must have already been recognized as having the rights and obligations which are attached to the possession of nationality of the country in which he or she has taken up residence.[1]

10.1.1. Ability to Return and Remain

At a minimum, the claimant must be able to return to,[2] and remain in,[3] the putative Article 1E country before this provision can be invoked to exclude him or her from the Convention refugee definition. The provision is not limited to a consideration of those countries in which the

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[1] In *Dawlatly, George Elias George v. M.C.I.* (F.C.T.D., no. IMM-3607-97), Tremblay-Lamer, June 16, 1998 the claimant, a citizen of Sudan, was eligible for temporary resident status in Greece, a country where he had never resided, because of his marriage to a Greek national. The Court held that the CRDD erred in excluding the claimant under Article 1E on the ground that he should have sought asylum in Greece.

[2] *Olschewski, Alexander Nadirovich v. M.E.I.* (F.C.T.D., no. A-1424-92), McGillis, October 20, 1993 (although the claimants could re-apply for Ukrainian citizenship, their applications would be dealt with on a "case-by-case" basis and it was not clear that they would be able to return); *Mahdi, Roon Abdikarim v. M.C.I.* (F.C.T.D., no. IMM-1600-94), Gibson, November 15, 1994. Reported: *Mahdi v. Canada (Minister of Citizenship and Immigration)* (1994), 26 Imm. L.R. (2d) 311 (F.C.T.D.), affirmed on appeal *M.C.I. v. Mahdi, Roon Abdikarim* (F.C.A., no. A-632-94), Pratte, MacGuigan, Robertson, December 1, 1995. Reported: *Canada (Minister of Citizenship and Immigration) v. Mahdi* (1995), 32 Imm. L.R. (2d) 1 (F.C.A.).

[3] *M.C.I. v. Mohamud, Layla Ali* (F.C.T.D., no. IMM-4899-94), Rothstein, May 19, 1995, where the Court noted at 3, that the permit given to the Somali claimant by the Italian authorities, which was renewable annually, "does not give her rights analogous to Italian nationals. While the [claimant] had many rights, such as the right to work and travel in, and leave and return to Italy, she did not have the right to remain in Italy once the war was over and conditions [in Somalia] returned to normal." While Mr. Justice Rothstein was "not prepared to say that section E of Article 1 of the Convention means that a person ... must have rights that are identical in every respect to those of a national," it did, in his view, "mean that an important right such as the right to remain (in the absence of unusual circumstances such as a criminal conviction) must be afforded." In *Kanesharan, Vijeyaratnam v. M.C.I.* (F.C.T.D., no. IMM-269-96), Heald, September 23, 1996. Reported: *Kanesharan v. Canada (Minister of Citizenship and Immigration)* (1996), 36 Imm. L.R. (2d) 185 (F.C.T.D.), although the Sri Lankan claimant had been given extended permission to remain in the United Kingdom, the Court found, at 6-7, that the CRDD erred in excluding him because the U.K. Home Office reserved the right to remove persons to their country of nationality "should the prevailing circumstances change significantly in a positive manner" and their eligibility to remain in the U.K. indefinitely after seven years was not a certainty. The "tentative and conditional language" used by the Home Office did not entitle the CRDD to conclude as it did. See also *Hurt v. Canada (Minister of Manpower and Immigration)*, [1978] 2 F.C. 340 (C.A.), at 343.

claimant took up residence as a refugee.[4]

The Court of Appeal, in *Madhi*,[5] in dismissing the appeal against the decision of the Trial Division, held that the real question that had to be determined was whether the claimant was, when she applied for admission to Canada, a person who was still recognized by the competent authorities of the putative Article 1E country as a permanent resident of that country. That issue was to be decided on a balance of probabilities. In that case, after becoming a permanent resident of the United States, the claimant had returned to Somalia, her country of nationality, and thereby renounced her U.S. status. The Court of Appeal noted that this was not a case where the claimant had voluntarily renounced the protection of one country in order to seek refuge elsewhere, and held that she was not precluded from later claiming Convention refugee status in Canada.

As for the standard of proof required to meet the test of "on a balance of probabilities," the Court of Appeal in *Mahdi* instructed the CRDD to take into account any "serious possibility" that the American authorities would no longer recognize the claimant as a permanent resident and would, for that reason, deny her the right to return to the United States.[6]

In *Wassiq*,[7] the Trial Division pointed out that the correct test is whether the putative Article 1E country recognizes the claimant's right to return there, even if his or her travel documents have expired, and not whether in international law, or from Canada's perspective, that country has formal or legal responsibility for the claimant.

The issue of the operative time for the right to return appears to be somewhat fluid and murky, with one of the concerns apparently being asylum shopping and allowing status to lapse. In *Hibo Farah Mohamed*,[8] the claimants made refugee claims in Sweden, left for Canada while their claims were still pending, and were granted permanent residence status in Sweden one month later. The Court upheld the CRDD's exclusion finding. In this case, the relevant time to determine if the claimants had status elsewhere was at the time of the hearing, and not when the refugee claims were made. Although the Swedish permanent residence certificate had to be periodically renewed, there was no evidence that permanent residence in Sweden was subject to

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[4] *Kroon, Victor v. M.E.I.* (F.C.T.D., no. IMM-3161-93), MacKay, January 6, 1995, at 3. Reported: *Kroon v. Canada (Minister of Employment and Immigration)* (1995), 28 Imm. L.R. (2d) 164 (F.C.T.D.), at 167.

[5] *Mahdi* (F.C.A), *supra*, footnote 2, at 6. This decision does not answer clearly the question of whether a refugee claimant can be excluded under Article 1E when this person voluntarily abandons a country where the person had most of the rights and privileges of a national.

[6] See also *Hadissi, Fetneh v. M.C.I.* (F.C.T.D., no. IMM-5210-94), Jerome, March 29, 1996, at 5.

[7] *Wassiq, Pashtoon v. M.C.I.* (F.C.T.D., no. IMM-2283-95), Rothstein, April 10, 1996, at 6-7. Reported: *Wassiq v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 238 (F.C.T.D.), at 242. The Court also opined, at 240, that the relevant time for consideration of the validity and subsistence of a travel document is the time of the hearing before the CRDD, whereas the Court of Appeal in *Mahdi*, at 6, referred to the time the claimant applied for admission to Canada, and the Trial Division had referred, at 315, to the date of the vacation hearing. The issue of the relevant date was not, however, squarely before the Court of Appeal and is not discussed in its reasons for judgment. The normal rule in refugee cases is to admit evidence up to the date of the hearing in the CRDD that determines the issue (or until such time as the decision in the case is rendered).

[8] *Mohamed, Hibo Farah v. M.C.I.* (F.C.T.D., no. IMM-2248-96), Rothstein, April 7, 1997.

some form of arbitrary cancellation.

10.1.1.1. Onus to Renew Status

The case of *Shamlou,*[9] as well as other decisions of the Trial Division, suggests that there is an onus on the claimant to renew his or her status in the putative Article 1E country if it is renewable.

In *Shahpari,*[10] the claimant, an Iranian citizen, moved to France in 1984. In 1991, she acquired permanent residence and was issued a *carte de résident,* valid to 2001. In 1993, she returned to Iran, but in 1994, came back to France, and two months later came to Canada. At her CRDD hearing in 1997, her exist/re-entry visa for France had expired, but the panel found that Article 1E applied because that visa could be renewed. The Court held that: (1) the onus is on the Minister in Article 1E cases, but once *prima facie* evidence is adduced, the onus shifts to the claimant to demonstrate why, having destroyed her *carte de résident,* she could not apply for a new one; and (2) that the evidence before the panel reasonable allowed it to conclude that the visa could be renewed.

Mr. Justice Rothstein also added:

> [Claimants] should also remember that actions they themselves take which are intended to result in their not being able to return to a country which has already granted them Convention refugee status may well evidence an absence of the subjective fear of persecution in their original country from which they purport to be seeking refuge.

10.1.2. Rights and Obligations of a National

In determining whether the claimant falls within the ambit of Article 1E, the Trial Division in *Kroon*[11] endorsed a consideration of the basic rights to which the claimant is entitled under the constitution and the laws of the putative Article 1E country and a comparison of those with the rights acknowledged for that country's nationals. The Court stated:

> Here, the tribunal ... sought to assess whether the [claimant] would be recognized under the Estonian Constitution and its laws as having basic rights and obligations which attach to nationals of that country. It found, with some important exceptions, that was the case and that in certain key respects the [claimant] would enjoy, in Estonia, a status comparable to that of Estonian nationals and consistent with international conventions and treaties relating to rights and obligations of individuals. In particular, it found ... that the [claimant] could be expected to be restored to his rights of

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[9] *Shamlou, Pasha v. M.C.I.* (F.C.T.D, no. IMM-4967-94), Teitelbaum, November 15, 1995. Reported: *Shamlou v. Canada (Minister of Citizenship and Immigration)* (1995), 32 Imm. L.R. (2d) 135 (F.C.T.D.).

[10] *Shahpari, Khadijeh v. M.C.I.* (F.C.T.D., no. IMM-2327-97), Rothstein, April 3, 1998. Reported: *Shahpari v. Canada (Minister of Citizenship and Immigration)* (1998), 44 Imm. L.R. (2d) 139 (F.C.T.D.). This case was applied in *Kamana, Jimmy v. M.C.I.* (F.C.T.D., no. IMM-5998-98), Tremblay-Lamer, September 24, 1999.

[11] *Kroon, supra,* footnote 4, at 167.

> residency in Estonia as a registered non-citizen, upon his return, that within a reasonable time he would be entitled to apply for citizenship and in the meantime had a right to remain there with rights similar to most of those enjoyed by citizens.[12]

The Court found this approach to be reasonable and one supported by legal writers such as Grahl-Madsen and Hathaway.[13]

The Trial Division, in *Shamlou*,[14] accepted as "an accurate statement of the law" the following four criteria that the Board should follow in undertaking an analysis of the "basic rights" enjoyed by a claimant, as outlined by Lorne Waldman in *Immigration Law and Practice*:[15]

> (a) the right to return to the country of residence;
>
> (b) the right to work freely without restrictions;
>
> (c) the right to study, and
>
> (d) full access to social services in the country of residence.
>
> If the [claimant] has some sort of temporary status which must be renewed, and which could be cancelled, or if the [claimant] does not have the right to return to the country of residence, clearly the [claimant] should not be excluded under Art. 1E.

The Court was satisfied the CRDD had come to a reasonable conclusion in determining that the Iranian claimant, who had become a permanent resident of Mexico, enjoyed substantially the same rights as Mexican nationals, even if he had chosen not to renew his Mexican travel documents (there was some evidence they were no longer renewable after his absence of more than three years) and not to wait for his Mexican citizenship status to be formalized. Although not entitled to vote, these rights included the ability to leave, re-enter and reside anywhere in the country, access to free health care, the right to purchase and own property, and the ability to seek, obtain and change employment. Furthermore, the Mexican authorities had at no time attempted to return him to Iran and there was no allegation of persecution in Mexico.[16]

In *Hamdan*,[17] the Court stated as follows:

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[12] *Kroon, supra,* footnote 4, at 167. The particular rights and obligations at issue in *Kroon* were discussed at considerable length by the CRDD in M92-10972/5, Gilad, Sparks, May 7, 1993. The Court itself did not delineate clearly the extent and nature of the rights and obligations which must exist at a minimum. It simply agreed with the approach taken by the CRDD in this case.

[13] *Kroon, supra,* footnote 4, at 168. See Grahl-Madsen, Atle, *The Status of Refugees in International Law*, (Leyden: A W. Sijthoff, 1966), Volume 1, pages 269-270, and Hathaway, James C., *The Law of Refugee Status*, (Toronto: Butterworths, 1991), pages 211-214.

[14] *Shamlou, supra,* footnote 9, at 152.

[15] (Toronto: Butterworths, 1992), vol. 1, §8.218 at 8.204-8.205 (Issue 17/2/97).

[16] *Shamlou, supra,* footnote 9, at 142.

[17] *Hamdan, Kadhom Abdul Hu v. M.C.I.* (F.C.T.D., no. IMM-1346-96), Jerome, March 27, 1997. Reported: *Hamdan v. Canada (Minister of Citizenship and Immigration)* (1997), 38 Imm. L.R. (2d) 20 (F.C.T.D.), at 23. In this case, the Court found it critical that the claimant could neither work nor access social services in the

> It is not necessary to comment on whether the criteria laid out in *Shamlou* must all be satisfied for exclusion under Article 1(E), or whether other criteria may be relevant in some cases. The relevant criteria will change depending on the rights which normally accrue to citizens in the country of residence subject to scrutiny.

In *Kamana,*[18] the claimant had acquired refugee status in Burundi. The evidence indicated that refugee status in Burundi included the right not to be deported from that country. Except for the right to vote, he had the same rights as did Burundi citizens, namely, the right to education and to work. The Court held that Article 1E therefore applied.

10.1.3. Fear of Persecution in the Article 1E Country

As to the issue of whether the CRDD should determine if the claimant has a well-founded fear of persecution for a Convention reason in the Article 1E country, the only case dealing explicitly with the matter is *Kroon*. In this case, the Court stated that if a claimant were found to enjoy the rights and obligations of a national,

> ... that would ordinarily be the end of the matter, for his claim is then excluded from consideration as a refugee claim.[19]

Earlier in the *Kroon* judgment, Mr. Justice MacKay, in commenting on the purpose of Article 1E, seemed to suggest that if a claimant faced a threat of persecution in the putative Article 1E country, then that country would not be an Article 1E country.

> In my view, the purpose of Article 1E is to support regular immigration laws of countries in the international community, and within the *Immigration Act* of this country to support the purposes of that Act and the policies it seeks to legislate, by limiting refugee claims to those who clearly face the threat of persecution. If A faces such a threat in his own country, but is living in another country, with or without refugee status, *and there faces no threat of persecution for Convention reasons*, or put another way, A enjoys the same rights of status as nationals of the second country, the function of Article 1E is to exclude that person as a potential refugee claimant in a third country.[20]

Philippines.

[18] *Kamana, supra,* footnote 10.

[19] *Kroon, supra,* footnote 4, at 168. The Court upheld the finding of the CRDD that the claimant enjoyed the rights and obligations of a national of Estonia but disagreed with its decision to nevertheless consider the merits of the claim against Estonia after having determined Estonia to be an Article 1E country.

[20] *Kroon, supra,* footnote 4, at 167-168. Quaere whether there is an internal contradiction in the judgment or whether MacKay J. might be simply suggesting that in considering whether a country is in fact an Article 1E country, the CRDD should consider whether the claimant faces a threat of persecution there (as opposed to considering the issue of persecution after determining the country to be an Article 1E country). See also *Shamlou, supra,* footnote 2, at 142, where the Court notes that both the CRDD, in its reasons, and the respondent, in his arguments, referred to the lack of persecution in Mexico (the Article 1E country) as one of the factors taken into consideration in concluding that the claimant enjoyed most of the rights and obligations of a national in that country. The Court itself does not list this factor in its conclusions, at 151-152, however, it is arguably implied in that it finds the CRDD conclusions reasonable.

(emphasis added)

A case that dealt implicitly with the issue of whether the CRDD should consider whether the claimant has a well-founded fear of persecution in the Article 1E country was *Olschewski*.[21] There, the CRDD had determined that the claimant did not have a well-founded fear of persecution in Israel and, in the alternative, that he enjoyed the rights and obligations of a national in Ukraine (and was thus excluded) and, furthermore, that his fear of persecution in Ukraine was not well founded. The Court disagreed with all the findings of the CRDD and perhaps, by considering the issue of a well-founded fear of persecution in Ukraine, implicitly agreed that the CRDD could in fact assess a claim against the Article 1E country. As the Court put it,

> Accordingly ... the Article [1E] would not appear to apply. Alternatively, even if I am wrong in concluding that the Article does not apply, I am nevertheless of the opinion that the Board erred in the articulation of its reasons in support of its conclusion that the [claimants] failed to establish a well-founded fear of persecution in Ukraine on the basis of religion.[22]

In *Feimi*,[23] the Court dealt with an Albanian national who had moved to Greece to escape a blood feud. There he was accepted as "an undocumented resident" on the island of Hydra. Although there was no specific reference to Article 1E, in upholding the negative CRDD decision, the Court focused on adequacy of state protection in Greece. In the Court's view, no evidence was presented to indicate the police system was such that Greece could not have offered the claimant protection.

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[21] *Olschewski, supra,* footnote 2.

[22] *Olschewski, supra,* footnote 2, at 2.

[23] *Feimi, Jani Ardian v. M.C.I.* (F.C.T.D., no. IMM-2934-98), Teitelbaum, June 11, 1999.

ARTICLE 1F

10.2. ARTICLE 1F(a): Crimes Against Peace, War Crimes and Crimes Against Humanity[24]

In order to define Article 1F(a) crimes, reference must be had to the international instruments[25] that deal with these crimes. The international instrument most frequently used to define these crimes is the *Charter of the International Military Tribunal*.[26]

10.2.1. Crimes Against Peace

Since a crime against peace historically may only be committed in the context of an international war, there have been no Federal Court or CRDD decisions involving this aspect of the exclusion clause.

10.2.2. War Crimes

Numerous international instruments may be referred to when defining these crimes, including the *Charter of the International Military Tribunal*, the *Geneva Conventions* and the *Additional Protocol*. In *Ramirez*,[27] the Court of Appeal noted that crimes committed during the civil war in El Salvador were either war crimes or crimes against humanity.

The Supreme Court of Canada in *Finta*[28] set out the requisite *mens rea* (mental state) and *actus reus* (physical element) of a war crime or a crime against humanity under section 7(3.71) of the Canadian *Criminal Code*. The Court did not consider Article 1F(a).[29]

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[24] For further reading see *Research Paper on Article 1F of the 1951 Convention Relating to the Status of Refugee in Canadian Law*, IRB Legal Services, (Manon Brassard & Nancy Weisman), December 14, 1994, and Weisman, N., "Article 1F(a) of the 1951 Convention Relating to the Status of Refugees in Canadian Law", *International Journal of Refugee Law*, Volume 8, No 1/2, Oxford University Press, 1996.

[25] See Annex VI of the UNHCR *Handbook* for a partial list of applicable international instruments.

[26] 82 U.N.T.S. 279. See Annex V of the UNHCR *Handbook*.

[27] *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.), at 310.

[28] *R. v. Finta*, [1994] 1 S.C.R. 701.

[29] The Supreme Court in *Finta*, at 819, indicated that the *mens rea* standard for a crime against humanity or a war crime is met if "there is an element of subjective knowledge on the part of the accused of the factual conditions which render the actions a crime against humanity." This standard, which is consistent with the domestic *mens rea* standard, seems to be at odds with the international law doctrine of command responsibility, referred to in *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), where a superior is responsible for crimes committed by his or her subordinates not only if he or she was aware of or willfully blind to the crimes, but also if he or she ought to have known about them. See also *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.).

10.2.3. Crimes Against Humanity

Crimes against humanity may be committed during a war - civil or international - as well as in times of peace.[30] The crime must be committed in a "widespread systematic fashion".[31]

In addition, when "barbarous cruelty" is an additional component of kidnapping, unlawful confinement, robbery and manslaughter, such offences can achieve the level of crimes against humanity.[32]

The perpetrator of a crime against humanity may be an individual acting independently of a State, especially those involved in paramilitary or armed revolutionary movements, or a person acting in conjunction with the authorities of a State.[33]

It is crucial that the CRDD, in making a decision to exclude under Article 1F(a), provide findings of fact as to specific crimes against humanity which the claimant is alleged to have committed. The CRDD should make findings as to: acts committed by the immediate perpetrators; the claimant's knowledge of the acts; his sharing in the purpose of the acts; and whether the acts constituted crimes against humanity.[34]

10.2.4. Balancing

There is no requirement to balance the nature of the Article 1F(a) crime with the degree of persecution feared.[35]

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[30] *Sivakumar, ibid.* Crimes against humanity are defined in the Charter of the International Military Tribunal as "...murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population..." The Court in *Sumaida, Hussein Ali v. M.C.I.* (F.C.T.D., no. A-94-92), Simpson, August 14, 1996. Reported: *Sumaida v. Canada (Minister of Citizenship and Immigration)* (1996), 35 Imm. L.R. (2d) 315 (F.C.T.D.), questioned whether members of a terrorist organization could be considered "civilians" in the context of a crime against humanity. This was not an issue in *Rasuli, Nazir Ahmad v. M.C.I.* (F.C.T.D., no. IMM-3119-95), Heald, October 25, 1996, where the Court upheld the exclusion of a claimant for being complicit in acts of torture directed against "dangerous persons". See also *Bamlaku, Mulualem* v. *M.C.I.* (F.C.T.D., no. IMM-846-97), Gibson, January 16, 1998. In *Yang, Jin Xiang* v. *M.C.I.* (F.C.T.D., no. IMM-1372-98), Evans, February 9, 1999 the Court found that participation in the implementation of China's one-child policy which included forced sterilization and forced abortion constituted crimes against humanity.

[31] *Sivakumar, supra,* footnote 29, at 443. See also *Suliman, Shakir Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2829-96), McGillis, June 13, 1997, which held that when determining whether certain activities of the police constitute crimes against humanity, the CRDD must consider whether the victims of the police abuse were "... members of a group which has been targeted systematically and in a widespread manner."

[32] *Finta, supra,* footnote 28.

[33] *Sivakumar, supra,* footnote 29, at 444.

[34] *Sivakumar, supra,* footnote 29, at 449; *Cardenas, Roberto Andres Poblete v. M.E.I.* (F.C.T.D., no. 93-A-171), Jerome, February 4, 1994. Reported: *Cardenas v. Canada (Minister of Employment and Immigration)* (1994), 23 Imm. L.R. (2d) 244 (F.C.T.D.), at 251-252. In *Cibaric, Ivan v. M.C.I.* (F.C.T.D., no. IMM-1078-95), Noël, December 18, 1995, the Court found that the claimant's participation in certain actions during the war in the former Yugoslavia were reasonably characterized by the Refugee Division as crimes against humanity and as actions which were a regular part of the army's operation.

[35] *Gonzalez v. Canada (Minister of Employment and Immigration),* [1994] 3 F.C. 646 (C.A.), at 657. See also

10.2.5. Defences

There may be circumstances where a claimant will invoke successfully certain defences which absolve him or her from criminal responsibility and thus he or she will not be excluded from refugee status, despite the claimant's commission of a war crime or crime against humanity.

10.2.5.1. Duress

The defence of duress may be used to justify participation in certain offences providing the perpetrator was in danger of imminent harm,[36] the evil threatened him or her was on balance greater than or equal to the evil which he or she inflicted on the victim[37] and he or she was not responsible for his own predicament.[38]

10.2.5.2. Superior Orders

A claimant may raise the defence that he or she was ordered to commit the offence by his military superior and that under military law, such orders must be obeyed. The Supreme Court of Canada in *Finta*, citing numerous international law decisions, held that this defence will not be successful if the military order was "manifestly unlawful" or "patently and obviously wrong", in other words, if it "offends the conscience of every reasonable, right thinking person".[39]

If this defence is raised in conjunction with the defence of duress, in that the claimant feared punishment if he or she disobeyed the order, then the principles relating to the defence of duress would apply.

10.2.5.3. Military Necessity

A claimant may raise the defence that the military action carried out was justified by the general circumstances of battle. However, if the deaths of innocent civilians are as a result of intentional, deliberate and unjustified acts of killing, such acts may constitute war crimes or crimes against humanity.[40]

M.C.I. v. Malouf, François (F.C.A., no. A-19-95), Hugessen, Décary, Robertson, November 9, 1995. Reported: *Canada (Minister of Citizenship and Immigration) v. Malouf* (1995), 190 N.R. 230 (F.C.A.).

[36] *Ramirez, supra,* footnote 27, at 327-328.

[37] *Ramirez, supra,* footnote 27, at 328.

[38] *Ramirez, supra,* footnote 27, at 327-328, referring to the treatment of duress in the draft *Code Of Offences Against the Peace and Security of Mankind*, in process by the International Law Commission since 1947. See also, The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (London, H.M.S.O., 1949), Volume XV, at page 132.

[39] *Finta, supra,* footnote 28, at 834. Since historically the superior orders defence has only served to mitigate punishment rather than absolve the perpetrator from responsibility, the usefulness of this defence in refugee law is questionable. However, the Court in *Equizbal v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 514 (C.A.), at 524, referred to the principles relating to superior orders in *Finta* and found that "torturing the truth out of someone is manifestly unlawful".

[40] *Gonzalez, supra,* footnote 35, (see concurring reasons of Mr. Justice Létourneau, at 661).

10.2.5.4. Remorse

Remorse is immaterial in determining the culpability of a perpetrator of a war crime or a crime against humanity.[41]

10.2.6. Complicity

Where a claimant has not in a "physical" sense committed a crime, but has aided, instigated or counselled a perpetrator in the commission of a war crime or crime against humanity, he or she may, as an accomplice, be held responsible for the crime and thus subject to being excluded from the refugee definition. An accomplice is as culpable as the principle perpetrator.[42] When determining the culpability of a claimant who has had a prior association with a group responsible for excludable crimes, regard should be had to the following factors: method of recruitment; nature of the organization; the claimant's rank; knowledge of atrocities; opportunity to leave the organization and period of time spent in the organization.[43]

The Court of Appeal held in *Ramirez* that "no one can commit international offences without personal and knowing participation".[44]

In *Solomon*,[45] the Court referred the case back for rehearing as the claimant had been a member of an organization whose actions may have ultimately resulted in the mistreatment of others; although the claimant was found not to have engaged in acts of violence, he might have been excluded through association. In contrast, in *Ledezma*[46] the Court found that the CRDD erred in its conclusion that the claimant, a member of the military, was an accomplice to crimes against humanity as the evidence revealed it was the police, not the military who was responsible for the abuses.

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[41] *Ramirez, supra,* footnote 27, at 328.

[42] *Moreno, supra,* footnote 29, at 320; *Penate v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 79 (T.D.), at 84.

[43] *Bahamin, Fardin v. M.E.I.* (F.C.A., no. A-115-92), Hugessen, MacGuigan, Linden, June 20, 1994. Reported: *Bahamin v. Canada (Minister of Employment and Immigration)* (1994), 171 N.R. 79 (F.C.A.). In *M.C.I.* v. *Nagra, Harjinderpal Singh* (F.C.T.D., no. IMM-5534-98), Rouleau, October 27, 1999, the Court upheld the decision of the CRDD that the claimant should not be found complicit because he was unaware of the violence of the group in which he was a member. In *Sifuentes Salazar, Gerardo Florentino et al.* v. *M.C.I.* (F.C.T.D., no. IMM-977-98), Tremblay-Lamer, April 16, 1999, the Court did not uphold the exclusion of the claimant as the evidence did not reveal that the claimant had knowledge of the crimes committed.

[44] *Ramirez, supra,* footnote 27, at 317. See also *Cardenas, supra,* footnote 34, where the Court set aside the decision of the CRDD because it erroneously inculpated the claimant in the crimes against humanity committed by a faction of the claimant's organization of which the claimant was not a member. As the Court pointed out in *M.C.I. v. Bazargan, Mohammad Hassan* (F.C.A., no. A-400-95), Marceau, Décary, Chevalier, September 18, 1996, "personal and knowing participation" can be direct or indirect, and does not require formal membership in the group concerned. One need not be a member of a group in order to be an accomplice to its acts.

[45] *M.C.I. v. Solomon, Yohannes* (F.C.T.D., no. IMM-326-95), Gibson, October 26, 1995. Reported: *Canada (Minister of Citizenship and Immigration) v. Solomon* (1995), 31 Imm. L.R. (2d) 27 F.C.T.D.

[46] *Ledezma, Jorge Ernesto Paniagua v. M.C.I.* (F.C.T.D., no. IMM-3785-96), Simpson, December 1, 1997.

10.2.6.1. Mere Membership in an Organization

In *Ramirez* the Court of Appeal stated:

> ... mere membership in an organization which from *time to time* commits international offences in not normally sufficient for exclusion from refugee status.[47] (emphasis added)

In contrast the Court held that:

> ... where an organization is principally directed to a *limited, brutal purpose*, such as a secret police activity, mere membership *may by necessity* involve personal and knowing participation in persecutorial acts.[48] (emphasis added)

Membership in these organizations, does not automatically result in exclusion; the CRDD must determine whether the claimant had knowledge of the crimes being committed by the members of the organization.[49] There is a "presumption of complicity" when the claimant was a member of such a group whereby

> ... it can generally be assumed that its members intentionally and voluntarily joined and remained in the group for the common purpose of actively adding
>
> their personal efforts to the group's cause.[50]

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[47] *Ramirez, supra,* footnote 27, at 317.

[48] *Ramirez, supra,* footnote 27, at 317. In *Balta, Dragomir v. M.C.I.* (F.C.T.D., no. IMM-2459-94), Wetston, January 27, 1995, at 5. Reported: *Balta v. Canada (Minister of Citizenship and Immigration)* (1995), 27 Imm. L.R. (2d) 226 (F.C.T.D.), the Court disagreed with the conclusion of the CRDD that the national army in question was a "terrorist organization" and therefore principally directed to a limited, brutal purpose. In *Shakarabi, Seyed Hassan* v. *M.C.I.* (F.C.T.D., no. IMM-1371-97), Teitelbaum, April 1, 1998, the Court concluded that the Shah's secret police, the Savak,, was an organization principally directed to a limited brutal purpose even though it was also involved in domestic and foreign security. As an informant for this organization the claimant was found to be complicit in the abuses.

[49] *Saridag, Ahmet v. M.E.I.* (F.C.T.D., no. IMM-5691-93), McKeown, October 5, 1994, at 4. The issue of knowledge may be a matter of credibility. See *Zamora, Miguel Angel v. M.E.I.* (F.C.A., no. A-771-91), Stone, Létourneau, Robertson, July 5, 1994 where the Court upheld the decision of the CRDD to reject the claimant's contention that he had no knowledge of the acts of torture perpetrated by his group. In *Mehmoud, Sultan* v. *M.C.I.* (F.C.T.D., no. IMM-1734-97), Muldoon, July 7, 1998 the claimant was found complicit in crimes against humanity even though he never took part in violence. Although he claimed to be merely a supporter of its religious and charitable activities, given his rank as a deputy commander in a militant organization it was determined he must have had knowledge of the violent attacks and was therefore excluded as an accomplice. See also *Singh, Gurpal* v. *M.C.I.* (F.C.T.D., no. IMM-5116-97), Strayer, September 2, 1998, involving the claimant's time of service with the Punjab Armed Police.

[50] *Saridag*, ibid., at 4. See Zadeh, Hamid Abass v. M.C.I. (F.C.T.D., no. IMM-3077-94), Wetston, January 21, 1995, at 4, where the Court upheld the finding of the CRDD that the claimant's organization, which routinely used torture, was an "organization with a limited, brutal purpose". The Court then considered whether the claimant had the requisite "personal and knowing participation". See also *Randhawa, Rana Partap Sing v. M.E.I.* (F.C.T.D., no. IMM-5540-93), Simpson, August 31, 1994; *Nejad, Saeed Javidani-Tabriz v. M.C.I.* (F.C.T.D., no. IMM-4624-93), Richard, November 16, 1994, at 5; *Tarkchin, Shahram v. M.E.I.* (F.C.A., no. A-159-92), Hugessen, Strayer, Robertson, January 24, 1995; *Srour, Immad v. S.G.C.* (F.C.T.D., no. IMM-1778-94), Rouleau, January 26, 1994; *Sulemana, Halilu v. M.C.I.* (F.C.T.D., no. IMM-3355-94), Muldoon,

This presumption is clearly rebuttable.[51]

10.2.6.2. Presence at the Scene

The Court of Appeal has held that "mere presence at the scene of an offence is not enough to qualify as personal and knowing participation",[52] unless the onlooker has an intrinsic connection with the persecuting group.[53] The Court concluded that

> ... complicity rests in such cases ... on the existence of a *shared common purpose* and the knowledge that all of the parties in question may have of it.[54] (emphasis added)

The culpability of a claimant was rejected where the claimant, shortly after being forcibly recruited, had witnessed on only one occasion, the torture of a prisoner.[55] In that case, however, the claimant had had no prior knowledge of the acts to be perpetrated.

10.2.6.3. Rounding Up of Dissidents

A claimant's activities in rounding up suspects may constitute personal involvement in the commission of any offences that follow providing the claimant had knowledge that such atrocities

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March 17, 1995; *M.C.I. v. Cordon, Jose Anibal Cortez* (F.C.T.D., no. IMM-3042-94), Pinard, April 20, 1995; *Diaz, Cesar Martin v. M.C.I.* (F.C.T.D., no. IMM-1562-94), Muldoon, April 24, 1995; *Gracias-Luna, Juan Ramon v. M.C.I.* (F.C.T.D., no. A-1139-92), Simpson, May 25, 1995; Ramirez, *Mayor Javier Quinonez v. M.C.I.* (F.C.T.D., no. IMM-4683-94), Nadon, April 24, 1995; *Castillo, Lourdes Abigail v. M.C.I.* (F.C.T.D., no. IMM-430-95), Jerome, January 16, 1996; *Aden, Ahmed Abdulkadir v. M.C.I.* (F.C.T.D., no. IMM-2912-95), MacKay, August 14, 1996. Reported: *Aden v. Canada (Minister of Citizenship and Immigration)* (1996), 35 Imm. L.R. (2d) 40 (F.C.T.D.); and *Sumaida*, supra, footnote 30. In *Grewal, Harjit Singh v. M.C.I.* (F.C.T.D., no. IMM-4674-98), Reed, July 23, 1999 and *Khera, Daljinder v. M.C.I.* (F.C.T.D., no. IMM-4009-97), Pinard, July 8, 1999, the Court found that although the Punjab Police force has a legitimate purpose - the maintaining of law and order - the Court upheld the CRDD findings that the claimants were complicit in crimes against humanity because of their knowledge of the atrocities committed by that police force. See also, *Say, Chea v. M.C.I.* (F.C.T.D., no. IMM-2547-96), Lutfy, May 16, 1997; *Guardano, Roberto v. M.C.I.* (F.C.T.D., no. IMM-2344-97), Heald, June 2, 1998; *Paz, Lazaro Cartagena v. M.C.I.* (F.C.T.D., no. IMM-226-98), Pinard, January 6, 1999; *Canada (Minister of Citizenship and Immigration) v. Hajialikhani* [1999] 1 F.C. 181 (T.D); and *Quinonez, Hugo Arnoldo Trejo v. M.C.I.* (F.C.T.D., no. IMM-2590-97), Nadon, January 12, 1999.

[51] *Saridag*, supra, footnote 49, at 4. In *Balta*, supra, footnote 48, the Court did not uphold the decision of the CRDD that there was sufficient evidence that the claimant had sufficient knowledge or personal participation. See also *Aden* ibid., and *Sumaida*, supra, footnote 30.

[52] *Ramirez, supra,* footnote 27, at 317.

[53] *Ramirez, supra,* footnote 27, at 317.

[54] *Ramirez, supra,* footnote 27, at 318. See also *Alza, Julian Ulises v. M.C.I.* (F.C.T.D., no. IMM-3657-94), MacKay, March 26, 1996. See also *Kudjoe, Rommel* v. *M.C.I.* (F.C.T.D., no. IMM-5129-97), Pinard, December 4, 1998 where the Court held that the claimant was not an "innocent bystander" given his knowledge of the human rights abuses and the fact he continued to work for the organization even after gaining this knowledge.

[55] *Moreno, supra,* footnote 42, at 323. A claimant is under no obligation to prevent acts of torture being perpetrated by others.

were being committed.[56]

10.2.6.4. Responsibility of Superiors

In *Sivakumar* the Court of Appeal held that "a commander may be responsible for international crimes committed by those under his command, but only if there is knowledge or reason to know about them."[57] In addition,

> the closer one is to being a leader rather than an ordinary member, the more likely it is that an inference will be drawn that one knew of the crime and shared the organization's purpose in committing that crime.[58]

In *Mohammad*,[59] the Court held that the claimant was complicit in Article 1F(a) crimes since, as prison director, he knew or should have known of the crimes committed against prisoners.

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[56] *Ramirez, supra,* footnote 27, at 324. In *Gutierrez, Luis Eduardo v. M.E.I.* (F.C.T.D., no. IMM-2170-93), MacKay, October 11, 1994, at 11. Reported: *Gutierrez v. Canada (Minister of Employment and Immigration)* (1994), 30 Imm. L.R. (2d) 106 (F.C.T.D.), the claimant was found complicit because he know that his work in transporting detainees led to the persecution of individuals. Similarly in *Rasuli, supra,* footnote 30, the claimant was excluded because he informed on individuals to an organization known for it commission of crimes against humanity.

[57] *Sivakumar, supra,* footnote 29, at 439.

[58] *Sivakumar, supra,* footnote 29, at 440.

[59] *Mohammad, Zahir v. M.C.I.* (F.C.T.D., no. IMM-4227-94), Nadon, October 25, 1995.

10.3. ARTICLE 1 F(b): Serious Non-Political Crimes

10.3.1. "Serious Crimes"

In *Brzezinski,*[60] the Trial Division considered for the first time what is meant by "serious crime" within the context of Article 1 F(b). In this case the claimants acknowledged that they supported their family by stealing, namely shoplifting, both before and after coming to Canada. While the convictions in Canada are not relevant as they were not committed "outside the country of refuge", the Court, after a review of the *travaux preparatoires*, held that the intention of the Convention was not to exclude persons who committed minor crimes, even "an accumulation of petty crimes." Thus, while shoplifting was recognized by the Court as being a serious social problem, it was not a "serious" crime within the meaning of Article 1 F(b), despite evidence of the claimant's recidivism. The Court certified two questions involving the concept of habitual involvement in crimes.

A misdemeanour probably lacks the requisite seriousness to be considered under Article 1F(b).[61]

10.3.2. "Non-Political Crimes"

The Court of Appeal has held that in order for a crime to be characterized as political, and thus to fall outside the ambit of Article 1F(b), it must meet a two-pronged "incidence" test which requires first, the existence of a political disturbance related to a struggle to modify or abolish either a government or a government policy; and second, a rational nexus between the crime committed and the potential accomplishment of the political objective sought.[62]

The Court of Appeal considered and rejected the notion of balancing the seriousness of the persecution the claimant is likely to suffer against the gravity of the crime he committed.

> One final point. Another panel of this Court has already rejected the suggestion made by a number of authors that paragraph 1F(a) requires a kind of proportionality test which would weigh the persecution likely to be suffered by the refugee claimant against the gravity of this crime. Whether or not such a test may be appropriate for paragraph 1F(b) seems to me to be

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[60] *Brzezinski, Jan* v. *M.C.I.* (F.C.T.D., no. IMM-1333-97), Lutfy, July 9, 1998. In *Taleb, Ali et al.* v. *M.C.I.* (F.C.T.D., no. 1449-98), Tremblay-Lamer, May 18, 1999 the Court found that the offence of attempted kidnapping is punishable by a maximum of 14 years imprisonment and therefore is a "serious" offence within the meaning of Article 1F(b). In *Chan, San Tong* v. *M.C.I.* (F.C.T.D., no. IMM-2154-98), MacKay, April 23, 1999 the Court found that a conviction in the United States for using a communication facility to facilitate trafficking in a substantial volume of narcotics was a "serious" offence.

[61] *Osman, Abdirizak Said v. M.E.I.* (F.C.T.D., no. IMM-261-93), Nadon, December 22, 1993, at 4.

[62] *Gil v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 508 (C.A.) at 528-529 and 533. Mr. Justice Hugessen followed the evolution of the incidence test in British extradition case law, added some elements of American and other foreign jurisprudence, to form a composite test which he applied to the case at bar. It is by looking at the elements of the decisions which he underlined for emphasis and the terms of his final analysis at 532 that one can deduce the formulation of the test.

> even more problematical. As I have already indicated, the claimant to whom the exclusion clause applies is *ex hypothesi* in danger of persecution; the crime which he has committed is by definition "serious" and will therefore carry with it a heavy penalty which at a minimum will entail a lengthy term of imprisonment and may well include death. This country is apparently prepared to extradite criminals to face the death penalty and, at least for a crime of the nature of that which the [claimant] has admitted committing, I can see no reason why we should take any different attitude to a refugee claimant. It is not in the public interest that this country should become a safe haven for mass bombers.[63] (footnotes omitted)

Proportionality is a factor in the characterization of a crime. The gravity of the crime committed to effect change must be commensurate with the degree of repressiveness of the government in question for the crime to be considered a political one.

> Where it is appropriate to use a proportionality test under Article 1F(b) is in the weighing of the gravity of the crime as part of the process of deter.nining if we should brand it as "political". A very serious crime, such as murder, may be accepted as political if the regime against which it is committed is repressive and offers no scope for freedom of expression and the peaceful change of government or government policy. Under such a regime the claimant might be found to have had no other option to bring about political change. On the other hand, if the regime is a liberal democracy with constitutional guarantees of free speech and expression (assuming that such a regime could ever produce a genuine refugee) it is very difficult to think of any crime, let alone a serious one, which we would consider to be acceptable method of political action. To put the matter in concrete terms, the plotters against Hitler might have been able to claim refugee status; the assassin of John F. Kennedy could never do so.[64]

A plea of guilty to a charge of possession for the purpose of trafficking and trafficking in cocaine constitutes a sound basis for having serious reasons for considering that a person has committed a serious non-political crime.[65]

The words "admission to that country as a refugee" refer to the admission into Canada of a person intending to claim recognition as a Convention refugee.[66]

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[63] *Gil, ibid.*, at 534-5. A subsequent decision of the Trial Division took the opposite view, without referring to this precedent; see *Malouf v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 537 (T.D.), at 556-557, but note that the Federal Court of Appeal stated in *Malouf, supra,* footnote 35, that paragraph (b) of Article 1F should receive no different treatment than paragraphs (a) and (c). None of them requires the Refugee Division to balance the seriousness of the claimant's conduct against the alleged fear of persecution.

[64] *Gil, supra,* footnote 62, at 535.

[65] *Malouf, supra,* footnote 63, at 551.

[66] *Malouf, supra,* footnote 63, at 553.

10.4. ARTICLE 1F(C): ACTS CONTRARY TO THE PURPOSES AND PRINCIPLES OF THE UNITED NATIONS

On June 4, 1998 the Supreme Court of Canada released the decision in *Pushpanathan*[67] overturning the decision by the Federal Court of Appeal. The Supreme Court of Canada found no indication in international law that drug trafficking on any scale is to be considered contrary to the purposes and principles of the United Nations[68] and thus is not subject to exclusion under Article 1F(c).

Mr. Justice Bastarache, writing on behalf of the majority, held that:

> ... the purpose of Article 1F(c) can be characterized in the following terms: to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting.[69]

The Court noted that in dealing with Article 1 F(c),

> The guiding principle is that where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes and principles of the United Nations, then Article 1 F(c) will be applicable.[70]

The Court set out two categories of acts which fall within this exclusion clause. The **first category** is:

> ... where a widely accepted international agreement or United Nations resolution declares that the commission of certain acts is contrary to the purposes and principles of the United Nations.[71]

Enforced disappearances, torture and international terrorism were examples offered by the Court as falling in the first category as corresponding international instruments exist which specifically designate such acts as being contrary to the purposes and principles of the United

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[67] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

[68] *Ibid*, at 1032.

[69] *Ibid*, at 1029.

[70] *Ibid*, at 1030.

[71] *Ibid*, at 1030.

Nations.[72] The Court noted that "other sources of international law may be relevant in a court's determination of whether an act falls within 1F(c)" and noted that "determinations by the International Court of Justice may be compelling."[73]

The **second category** of acts which fall within the scope of Article 1F(c) are:

> those which a court is able, for itself, to characterize as serious, sustained and systemic violations of fundamental human rights constituting persecution.[74]

This second category was also described by the Court as including any act whereby an international instrument has indicated it is a violation of fundamental human rights.[75]

As a result, the Court determined that "conspiring to traffic in a narcotic is not a violation of Article 1F(c)."[76]

> Even though international trafficking in drugs in an extremely serious problem that the United Nations has taken extraordinary measures to eradicate, in the absence of clear indications that the international community recognizes drug trafficking as a sufficiently serious and sustained violation of fundamental human rights so as to amount to persecution, either through a specific designation as an act contrary to the purposes and principles of the United Nations (the first category), or through international instruments which otherwise indicate that trafficking is a serious violation of fundamental human rights (the second category) individuals should not be deprived of the essential protections contained in the Convention for having committed those acts.[77]

The Court also noted that exclusion under Article 1F(c) is not limited to persons in positions of power and indicated that non-state actors may fall within the provision.[78]

The Federal Court of Appeal had ruled in *Pushpanathan*[79] and in Malouf[80] that the CRDD is not required to balance the seriousness of the claimant's conduct against the alleged fear of persecution when considering any of the paragraphs of Article 1F. Since the Supreme Court of

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[72] *Ibid*, at 1030.

[73] *Ibid*, at 1032.

[74] *Ibid*, at 1032.

[75] *Ibid*, at 1035.

[76] *Ibid*, at 1035.

[77] *Ibid*, at 1035.

[78] *Ibid*, at 1031.

[79] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1996] 2 F.C. 49 (C.A.)

[80] *Supra*, foonote 35.

Canada did not comment on this aspect of the exclusion clauses, the dicta as regards the balancing can still be considered as good law. Nothing in the decision of the Supreme Court in *Pushpanathan* suggests that the Court intended to overrule or modify this point of law.

10.4.1. Complicity

In *Bazargan*,[81] the Court of Appeal, citing MacGuigan J.A. in *Ramirez*, adopted the position that personal and knowing participation in persecutorial acts is the only criterion to be applied in order to determine if a claimant is guilty of acts contrary to the purposes and principles of the United Nations. Formal membership in an organization whose members are guilty of such acts is not a prerequisite to the application of Article 1F(c).

> It is not working within an organization that makes someone an accomplice to the organization's activities, but knowingly contributing to those activities in anyway or making them possible whether from within or from outside the organization.[82]

Whether Article 1(Fa) or 1F(c) is involved, the same principles regarding complicity apply (see Chapter 10, section 10.2.6.)[83]

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[81] *Bazargan, supra,* footnote 44.

[82] *Bazargan, supra,* footnote 44, at 4.

[83] In *Bazargan, supra,* footnote 44, where complicity was an issue in the application of Article 1F(c), the Court of Appeal relied on several decisions where complicity was dealt with in the context of Article 1F(a), namely, *Ramirez, supra,* footnote 27; *Gutierrez, supra,* footnote 56; *Sivakumar, supra,* footnote 29; and *Moreno, supra,* footnote 42.

10.5. BURDEN AND STANDARD OF PROOF

The burden of establishing serious reasons for considering that international offences have been committed falls on the Government.

> Aside from avoiding the proving of a negative by a claimant, this also squares with the onus under paragraph 19(1)(j) of the *Immigration Act*, according to which it is the Government that must establish that it has reasonable grounds for excluding claimants. For all these reasons, the Canadian approach requires that the burden of proof be on the Government, as well as being on a basis of less than the balance of probabilities.[84]

The Minister does not have to be present at the hearing in order for the Refugee Division to consider exclusion clauses.[85]

The interpretation of "serious reasons for considering" has established the standard of proof[86] at less than the balance of probabilities.[87] The Federal Court of Appeal in *Moreno* elaborated on the standard it had earlier enunciated:

> In *Ramirez*, ... this Court canvassed this aspect of refugee law and concluded that the standard was one well below that required under either the criminal law ("beyond a reasonable doubt") or the civil law ("on a balance of probabilities" or "preponderance of evidence").[88]
>
> In *Ramirez* ... MacGuigan J.A. stated that serious reasons for considering constitutes an intelligible standard on its own which need not be assimilated to the reasonable standard in section 19 of the *Immigration Act*. This conclusion was echoed by Mr. Justice Robertson in *Moreno*, ... although Robertson, J.A. indicated, that for practical purposes, there was no difference between the standards. I agree that there is little, if any difference of meaning between the two formulations of the standard. Both

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[84] *Ramirez, supra,* footnote 27, at 314. *Bazargan, supra,* footnote 44, at 4: The Minister does not have to prove the respondent's guilt. He merely has to show - and the burden of proof resting on him is less than the balance of probabilities - that there are serious reasons for considering that the respondent is guilty.

[85] Although this principle was clear from the case law even before the decision in *Arica, Jose Domingo Malaga v. M.E.I.* (F.C.A., no. A-153-92), Stone, Robertson, McDonald, May 3, 1995. Reported: *Arica v. Canada (Minister of Employment and Immigration)* (1995), 182 N.R. (2d) 34 (F.C.A.), leave to appeal to S.C.C. refused: (1995), 198 N.R. 239 (S.C.C.), the Court of Appeal therein unequivocally stated: "The fact that the Minister does not participate in the hearing, either because he does not wish to do so or because he is not entitled to notice under Rule 9(3), does not alter the right of the Board to render a decision on the issue of exclusion." (At 6, unreported). See also *Ashari, Morteza Asna* v. *M.C.I.* (F.C.T.D., no. IMM-5205-97), Reed, August 21, 1998.

[86] In *Moreno, supra,* footnote 42, at 309, Mr. Justice Robertson wrote: "However, it may well be that in strict legal theory the exclusion clause should be construed as erecting a threshold test to be met by the Minister rather than prescribing a standard of proof *per se*."

[87] *Ramirez, supra,* footnote 27, at 311-4.

[88] *Moreno, supra,* footnote 42, at 308.

> of these standards require something more than suspicion or conjecture, but something less than the balance of probabilities.[89]

The Court also added that it "is universally accepted that the applicability of the exclusion clause does not depend on whether a claimant has been charged or convicted of the acts set out in the Convention."[90]

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[89] *Sivakumar, supra,* footnote 29, at 445.

[90] *Moreno, supra,* footnote 42, at 308.

CHAPTER 10

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INTERPRETATION OF THE CONVENTION REFUGEE DEFINITION IN THE CASE LAW

KEY POINTS

Legal Services
Immigration and Refugee Board
December 31, 1999

Chapter 2

COUNTRY OF PERSECUTION

1. The claimant must establish that he or she is a Convention refugee from the country of his or her nationality (or the country of his former habitual residence). Nationality means citizenship of a particular country. [section 2.1.]

Canada (Attorney General) v. Ward,
[1993] 2 S.C.R. 689.

2. If a claimant is a national of more than one country, the claimant must show that he or she is a Convention refugee with respect to all such countries. [section 2.1.1.]

Ward, supra.

3. A claimant may be considered to be a national of a country where the evidence establishes that application for citizenship is a mere formality and the authorities of that country do not have any discretion to refuse the application. Moreover, there must be a genuine connection or link with that country. [section 2.1.3.]

Bouianova, Tatiana v. M.E.I.
(F.C.T.D., no. 92-T-1437), Rothstein, June 11, 1993;
Katkova, Lioudmila v. M.C.I.
(F.C.T.D., no. IMM-2886-96), McKeown, May 22, 1997.

4. The concept "former habitual residence" is only relevant where the claimant is stateless, i.e. he or she does not have a country of nationality. [section 2.2.]

5. Former habitual residence implies a situation where a stateless person was admitted to a country with a view to enjoying a period of continuing residence of some duration. The claimant does not have to be legally able to return to a country of former habitual residence for it to be so described. The claimant must, however, have established a significant period of *de facto* residence in the country in question. [section 2.2.1.]

Maarouf v. Canada (Minister of Employment and Immigration),
[1994] 1 F.C. 723 (T.D.).

6. Where the stateless claimant has more than one country of former habitual residence, he or she must show that, on a balance of probabilities he or she would suffer persecution in any country of former habitual residence, and that he or she cannot return to any of his or her other countries of former habitual residence. This test may be termed "any country plus the *Ward* factor". [section 2.2.2.]

Thabet v. Canada (Minister of Employment and Immigration),
[1998] 4 F.C. 21 (C.A.).

7. Statelessness *per se* does not give rise to a claim to refugee status: the claimant must demonstrate a well-founded fear of persecution based on a Convention ground. [section 2.2.4.]

8. A denial of a right to return may constitute an act of persecution by the state; however, for it to be the basis of a claim, the refusal must be based on a Convention ground. [section 2.2.5.]

9. According to paragraph 101 of the UNHCR Handbook, stateless claimants need not avail themselves of state protection since there is no duty on the state to provide protection. The decisions of the Federal Court-Trial Division on this topic are not consistent. [section 2.2.6.]

Chapter 3

PERSECUTION

1. To be considered persecution, the mistreatment suffered or anticipated must be serious, i.e., it must constitute a key denial of a core human right. [section 3.1.1.1.]

Ward, supra;
Chan v. Canada (Minister of Employment and Immigration),
[1995] 3. S.C.R. 593 (dissenting opinion).

2. What constitutes a basic human right is determined by the international community, not by any one country. At the same time, in determining whether anticipated actions would constitute fundamental violations of basic human rights, it is acceptable to consider Canadian law. [section 3.1.1.1.]

Chan,supra.

3. The second criterion is that, generally, the mistreatment must be repetitive and persistent. [section 3.1.1.2.]

Rajudeen, Zahirdeen v. M.E.I.
(F.C.A., no. A-1779-83), Heald, Hugessen, Stone, July 4, 1984.

4. For the claim to succeed, the persecution must be linked to a Convention ground, in other words, there must be a nexus. [section 3.1.1.3.]

5. While most acts of persecution can be characterized as criminal, not all criminal acts constitute persecution. [section 3.1.1.4.]

Cortez, Delmy Isabel v. S.S.C.
(F.C.T.D., no. IMM-2482-93), McKeown, December 15, 1993.

6. It is not necessary, in order for persecution to exist, that the perpetrators of the harm belong to a certain category or hold a certain kind of position. In particular, persecution may exist even if state authorities are neither the immediate inflictors of the harm, nor complicit in the infliction. [section 3.1.1.5.]

Ward, supra;
Chan supra.

7. The claimant may be subject to a number of discriminatory or harassing acts. While these acts may individually not be serious enough to constitute persecution, they may cumulatively amount to persecution. [section 3.1.2.]

Madelat, Firouzeh v. M.E.I., Mirzabeglui, Maryam v. M.E.I.
(F.C.A., nos. A-537-89 and A-538-89),
MacGuigan, Mahoney, Linden, January 28, 1991.

Chapter 4

GROUNDS OF PERSECUTION

1. A claimant's fear of persecution must be by reason of one of the five grounds enumerated in the definition of Convention refugee - race, religion, nationality, membership in a particular social group and political opinion. There must be a link between the fear of persecution and one of the five grounds. [section 4.1.]

Ward, supra.

2. When determining the applicable grounds, the relevant consideration is the perception of the persecutor. This perception need not necessarily conform to the claimant's true beliefs. [section 4.1.]

Ward, supra.

3. Freedom of religion includes the right to manifest the religion in public, or private, in teaching, practices, worship and observance. [section 4.4.]

Fosu, Monsieur Kwaku v. M.E.I.
(F.C.T.D., no. A-35-93), Denault, November 16, 1994.

4. The meaning assigned to "particular social group" should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for international refugee protection. [section 4.5.]

Ward, supra.

5. As a working rule to achieve the above result, the Supreme Court of Canada in *Ward* identified three possible categories of particular social groups:

   (i) Groups defined by an innate or unchangeable characteristic;

   (ii) Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and

   (iii) Groups associated by a former voluntary status, unalterable due to its historic permanence. [section 4.5.]

Ward, supra.

6. A particular social group cannot be defined solely by the fact that a group of persons are objects of persecution, since the Convention refugee definition requires that the persecution be "by reason of" one of the grounds. [section 4.5.]

Ward, supra.

7. In the context of the Convention refugee definition, political opinion is any opinion on any matter in which the machinery of state, government and policy may be engaged; however this does not mean that only political opinions regarding the state will be relevant. [section 4.6.]

Ward, supra;
Klinko, Alexander v. M.C.I.
(F.C.A., no. A-321-98), Létourneau, Noël, Malone, February 22, 2000.

8. The political opinion at issue need not have been expressed outright, it can be perceived or imputed. As well, it need not necessarily conform to the claimant's true beliefs. What is relevant is the perception of the persecutor. [section 4.6.]

Ward, supra.

9. Victims of crime, corruption or vendettas may, in certain circumstances, establish a link between their fear of persecution and one of the five grounds in the definition. A link to political opinion will be established if the actual or perceived expression of the opinion involves matters in which the machinery of the state may be engaged. [section 4.7.]

Ward, supra;
Klinko, supra.

Chapter 5

WELL-FOUNDED FEAR

1. The definition of Convention refugee is forward-looking, therefore the fear of persecution is to be assessed at the time of the examination of the claim to refugee status. [section 5.1.]

2. The claimant does not have to establish that he or she was persecuted in the past or that he or she would or will be persecuted in the future. [section 5.1.]

Salibian v. Canada (Minister of Employment and Immigration),
[1990] 3 F.C. 250 (C.A.).

3. The claimant must establish, on a balance of probabilities, that there are "good grounds" for fearing persecution. This may also be stated as a "reasonable" or even a "serious possibility" as opposed to a mere possibility that the claimant would be persecuted if returned to the country of origin. [section 5.2.]

Adjei v. Canada (Minister of Employment and Immigration),
[1989] 2 F.C. 680 (C.A.).

4. A claimant may have a subjective fear that he or she will be persecuted if returned to his or her country, but the fear must be assessed objectively in light of the situation in the country to determine whether it is well founded. [section 5.3.]

Rajudeen, supra.

5. Delay in making a claim to refugee status or in leaving the country of persecution is not in itself a decisive factor, however it is a relevant and potentially important consideration. [section. 5.4.]

Huerta, Martha Laura Sanchez v. M.E.I.
(F.C.A., no. A-448-91), Hugessen, Desjardins, Létourneau, March 17, 1993.

6. Delay may point to a lack of subjective fear of persecution, the reasoning being that someone who was truly fearful would claim refugee status at the first opportunity. [section 5.4.]

7. Return to the country of persecution may indicate that a well-founded fear of persecution is lacking where the claimant's conduct is inconsistent with such a fear. [section 5.5.]

Chapter 6

PROTECTION

1. The responsibility to provide international protection only becomes engaged when national or state protection is unavailable to the claimant (international protection is surrogate). [section 6.1.1.]

Ward, supra.

2. In the case of multiple nationalities (citizenship), the claimant is expected to avail him or herself of the protection of all the countries of citizenship. [section 6.1.2.]

Ward, supra.

3. The availability of national protection forms part of the analysis of whether the claimant's fear is well founded. [section 6.1.3.]

Ward, supra.

4. Two presumptions are at play in refugee determination: (a) if the fear of persecution is credible (legitimate) and there is an absence of state protection, one can presume that persecution will be likely and the fear well founded; (b) absent a complete breakdown of state apparatus, states are presumed to be capable of protecting their citizens. [section 6.1.5.]

Ward, supra.

5. The claimant must approach his or her state for protection, if state protection might reasonably be forthcoming. [section 6.1.7.]

Ward, supra.

6. The claimant has the burden of rebutting the presumption of state protection. In order for the presumption to be rebutted, and in order to establish the reasonableness of failing to approach the state, the claimant must present "clear and convincing proof" of the state's inability to protect. [sections 6.1.5. and 6.1.8.]

Ward, supra.

7. A guarantee of protection for all citizens at all times is not to be expected. Nor is perfect protection. Where a state is in effective control of its territory, has military, police and civil authority in place and makes serious efforts to protect its citizens, the mere fact that it is not always successful will not justify a claim that the state is not providing protection. [section 6.1.10.]

M.E.I. v.Villafranca, Ignacio
(F.C.A., no. A-69-90), Hugessen, Marceau, Décary, December 18, 1992.

8. Protection must be from the state, not from non-state sources. The availability of protection from non-state sources may be relevant to the issue of the objective basis for the claim. [section 6.1.11.]

9. The more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her. [section 6.1.11.]

M.C.I. v. Kadenko, Ninal
(F.C.A., no. A-388-95), Hugessen, Décary, Chevalier, October 15, 1996.

10. Control of the claimant's country may be divided – geographically or otherwise – among several *de facto* authorities. Protection from any one of these authorities, or from a combination of them, will suffice. [section 6.1.9.]

Zalzali v. Canada (Minister of Employment and Immigration),
[1991] 3 F.C. 605 (C.A.).

11. According to paragraph 101 of the UNHCR Handbook, stateless claimants need not avail themselves of state protection since there is no duty on the state to provide protection. The decisions of the Federal Court–Trial Division on this topic are not consistent. [section 6.2.]

Chapter 7

CHANGE OF CIRCUMSTANCES AND COMPELLING REASONS

1. A change in country conditions is relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant will be persecuted in the event of return there. [section 7.1.1.]

Yusuf, Sofia Mohamed v. M.E.I.
(F.C.A., no. A-130-92), Hugessen, Strayer, Décary, January 9, 1995.

2. When a panel is weighing changed country conditions together with all the evidence, factors such as durability, effectiveness and substantiality are relevant. The more durable the changes are demonstrated to be, the heavier they will weigh against granting the claim. [section 7.1.2.]

Penate v. Canada (Minister of Employment and Immigration),
[1994] 2 F.C. 79 (T.D.).

3. While recent changes may be sufficient to remove the basis of the claimant's fear of persecution, the Refugee Division should not rely on or give much weight to changes that are short-lived, transitory, inchoate, tentative, inconsequential or otherwise ineffective in substance or implementation. [section 7.1.2.]

4. Whether a change of circumstances is sufficient for a fear of persecution to be no longer well founded must be determined in relation to the basis of the particular claim. [section 7.1.2.]

Rahman, Faizur v. M.E.I.
(F.C.A., no. A-1244-91), Marceau, Desjardins, Létourneau, May 14, 1993.

5. If a change in circumstances is to be relied on, the issue must be raised or notice must be given to the claimant. [section 7.1.4.]

6. There is no obligation on the Refugee Division to consider post-hearing evidence relating to changes in country conditions unless that evidence has been submitted by a party prior to the issuance of the panel's decision. However, if the Refugee Division considers such evidence on its own initiative, it must provide the claimant with an opportunity to comment, or it may reconvene the hearing to deal with that evidence. [section 7.1.5.]

7. The issue of compelling reasons, the exception found in section 2(3) of the *Immigration Act,* applies only where the claimant had a well-founded fear of persecution when he or she left his or her country of nationality and the reasons for the fear of persecution have ceased to exist. [section 7.2.1.]

8. A claimant will be entitled to Convention refugee status based on compelling reasons if he or she has suffered such appalling past persecution that their experience alone is compelling reason not to return the claimant, even though he or she may not have any reason to fear further persecution. [section 7.2.3.]

Canada (Minister of Employment and Immigration) v. Obstoj,
[1992] 2 F.C. 739 (C.A.).

9. To establish compelling reasons, the claimant (or a close family member) must have suffered from "atrocious" or "appalling" acts of persecution. Evidence of continuing psychological after-effects is relevant to a determination of the issue but is not a separate test that has to be met. [section 7.2.3.1.]

10. A claimant may be a Convention refugee as a consequence of events which have occurred in his or her home country since his or her departure or as a result of activities of the claimant since leaving his or her country. In these circumstances, the claimant is said to have a *sur place* claim. [section 7.3.]

11. A key issue in *sur place* claims is whether such actions have come to the attention of the authorities of the person's country of origin and how they are likely to be viewed by those authorities. [section 7.3.1.]

Chapter 8

INTERNAL FLIGHT ALTERNATIVE (IFA)

1. IFA arises when a claimant who has a well-founded fear of persecution in his or her home area of the country is not a Convention refugee because he or she has an internal flight alternative elsewhere in that country. [section 8.1.]

Rasaratnam v. Canada (Minister of Employment and Immigration), [1992] 1 F.C. 706 (C.A.).

2. The test to be applied in determining whether there is an IFA is two-pronged:

   (i) there is no serious possibility of the claimant being persecuted in the IFA;
   (ii) conditions in the IFA must be such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge there. [section 8.1.]

Rasaratnam, supra.

3. The second prong of the IFA test may be stated as follows: would it be unduly harsh to expect the claimant to move to another, less hostile part of the country before seeking refugee status abroad? [section 8.2.]

Thirunavukkarasu v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 589 (C.A.).

4. The claimant cannot be required to encounter great physical danger or undergo undue hardship in travelling to the IFA or staying there. [section 8.2.]

5. To satisfy the notice requirement, the issue of IFA must be raised by the RCO, the panel or the Minister before or during the hearing. Once the issue is raised, the onus is on the claimant to show that he or she does not have an IFA. [section 8.3.]

Chapter 9

PARTICULAR SITUATIONS

I. Civil war

1. The claimant is not barred from being considered a Convention refugee by the mere fact that the circumstances which he or she relies upon derive from, or are related to, a civil war. Equally, the mere fact that a civil war is underway in the claimant's country of origin, or that the claimant has a fear related to the civil war, is not sufficient to make the claimant a Convention refugee. [section 9.2.]

Salibian v. Canada (Minister of Employment and Immigration),
[1990] 3 F.C. 250 (C.A.);
IRB Chairperson's Guidelines,
"Civilian Non-Combatants Fearing Persecution in Civil War Situations", March 7, 1996.

2. Refugee claimants must establish a link between themselves and persecution for a Convention reason; they must be targeted for persecution in some way, either personally or collectively. [section 9.2.]

Rizkallah, Bader Fouad v. M.E.I.
(F.C.A., no. A-606-90), Marceau, MacGuigan, Desjardins, May 6, 1992.

3. The issue is not a comparison between the claimant's risk and the risk faced by other individuals or groups at risk for a Convention reason, but whether the claimant's risk is a risk of sufficiently serious harm and is linked to a Convention reason as opposed to the general, indiscriminate consequences of civil war. [section 9.2.1.2.]

IRB Chairperson's Guidelines,
"Civilian Non-Combatants Fearing Persecution in Civil War Situations", March 7, 1996;
Ali, Shaysta-Ameer v. M.C.I.
(F.C.A., no. A-772-96), Décary, Stone, Strayer, January 12, 1999.

II. Persecution vs. prosecution

1. The issue is to distinguish between a situation where a claimant has violated a law of general application and what he or she fears is prosecution and punishment for that violation and a situation where the violation relates to a law which is persecutory in either its application or its punishment. [section 9.3.1.]

2. As to whether there would be a nexus between application of the law to the claimant and a Convention ground, the following propositions are relevant:

   (i) A presumption of neutrality attaches to any law of general application. The onus is on the claimant to show that there is adverse differentiation.

(ii) The law may be inherently non-neutral. The neutrality of the law is to be judged objectively.

(iii) It is the intent and any principal effect of the law of general application which must be considered, not the claimant's motivation. If either the intent or a principal effect is to harm the rights of some person or category, then the law is not neutral. [section 9.3.2.]

Zolfagharkhani v. Canada (Minister of Employment and Immigration), [1993] 3 F.C. 540 (C.A.).

3. Regarding the seriousness of harm, the following must be considered:

(i) Is the penalty disproportionate to either the objective of the law or the offence?

(ii) The means by which the law is enforced. "Brutality in furtherance of a legitimate end is still brutality."

(iii) Is the prosecution and enforcement of the law within legal bounds? (section 9.3.2.)

Cheung v. Canada (Minister of Employment and Immigration), [1993] 2 F.C. 314 (C.A.); *Chan*, (dissenting opinion), *supra*

4. Certain emergency situations such as those which threaten national security or terrorism, may allow states to institute measures which, while violative of certain civil rights, may not amount to persecution. However, certain types of violations such as beatings and torture of suspects or other brutal treatment will more appropriately be termed persecution. (section 9.3.3.)

Cheung, supra; Thirunavukkarasu, supra.

III. Exit laws

1. A person who, having been subjected to no persecution in the past, violates an exit law applicable to all citizens and thereby exposes him or herself to punishment for the violation, is not a Convention refugee. [section 9.3.5.]

Valentin v Canada (Minister of Employment and Immigration), [1991] 3 F.C. 390 (C.A.).

2. Repercussions beyond the statutory sentence may suggest that the actions of the authorities are persecutory. [section 9.3.5.]

IV. Military service

1. It is not persecution for a country to have compulsory military service. [section 9.3.6.]

Popov, Leonid Anatolievich v. M.E.I.
(F.C.T.D., no. IMM-2567-93), Reed, April 11, 1994.

2. An aversion to military service or a fear of combat is not in itself sufficient to support a well-founded fear of persecution. [section 9.3.6.]

Garcia, Marvin Balmory Salvador v. S.S.C.
(F.C.T.D., no. IMM-2521-93), Pinard, February 4, 1994.

3. The *Zolfagharkhani* principles relating to laws of general application (noted above) apply to military-service situations. [sections 9.3.2. and 9.3.6].

Zolfagharkhani, supra.

4. Where the claimant invokes reasons of conscience for objecting to military service, it is necessary to determine whether the particular reasons are genuine and of sufficient significance. [section 9.3.6.]

5. A claimant may object to serving in a particular conflict, or to the use of a particular category of weapon, rather than objecting to military service altogether, and may be found to be a Convention refugee if the military actions objected to are judged by the international community to be contrary to basic rules of human conduct. [section 9.3.6.]

Zolfagharkhani, supra;
Ciric v. Canada (Minister of Employment and Immigration),
[1994] 2 F.C. 65 (TD).

6. In determining whether the claimant would face serious harm for failing to serve in the military, one must consider whether the claimant might be able to perform alternative service or obtain an exemption from service. One must also consider the harshness of the actual penalty for refusing to serve. [section 9.3.6.]

V. One-child policy

1. Forced or strongly coerced sterilization constitutes persecution, whether the victim is a woman or a man. Forced abortion also constitutes persecution. [section 9.3.7.]

Cheung, supra;
Lai, Quang v. M.E.I.

(F.C.T.D., no. IMM-307-93), McKeown, May 20, 1994.

2) The applicable Convention grounds, depending on the circumstances of the case, may be membership in a particular social group, religion and/or political opinion. (sections 4.4., 4.5., 4.6. and 9.3.7.)

Cheung,, supra;
Chan (SCC, dissenting opinion), *supra.*

VI. Religious or cultural mores

1. Restrictions upon women. [section 9.3.8.1.]

   (i) Restrictions imposed upon the dress and conduct of women may, in certain circumstances, constitute persecution. The breach of those restrictions may be perceived as political opinion but a claim may also be based on membership in a particular social group.

   (ii) Examples of gender-based persecution (based on religious or cultural mores) include female circumcision and being forced into a marriage.

2. Ahmadis from Pakistan. [section 9.3.8.2.]

   (i) There is case law which says that the mere existence of the laws targeting Ahmadis does not give an Ahmadi claimant good grounds for fearing persecution; however, the point is not altogether free from doubt. Some of the factors that have been considered by the Courts are whether the claimant engaged or is likely to engage in any of the prohibited activities and the likelihood that the law will actually be enforced.

VII. Indirect Persecution and Family Unity

1. Indirect persecution (a concept premised on the assumption that family members are likely to suffer great harm, such as loss of the victim's economic or social support, when their close relative is persecuted) does not constitute persecution within the definition of Convention refugee. For a claim to be successful there must be a personal nexus between the alleged persecution and a Convention ground. In certain circumstances the nexus will be membership in the particular social group "family". [section 9.4.]

Pour-Shariati, Dolat v. M.E.I.
(F.C.A., no. A-721-94), MacGuigan, Robertson, McDonald, June 10, 1997.

2. The concept of "family unity" (included in the UNHCR Handbook) has been rejected in Canadian law. This concept holds that if the directly-affected person meets the criteria in the definition, then family members may be recognized as Convention refugees even if they do not meet individually the definition's criteria. [section 9.4.]

Chapter 10

EXCLUSION CLAUSES

I. Article 1E

1. The Convention refugee definition does not apply to a person who is recognized by the authorities of a country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country. [section 10.1.]

Article 1 E of the *Convention Relating to the Status of Refugees*,
Schedule to the *Immigration Act*

2. At a minimum, the claimant must be able to return to and remain in the putative Article 1E country before he or she may be excluded from the Convention refugee definition. [section 10.1.1.]

M.C.I. v. Mahdi, Roon Abdikarim
(F.C.A., no. A-632-94), Pratte, MacGuigan, Robertson, December 1, 1995.

3. In determining whether the claimant enjoys the rights and obligations of a national, the following criteria are useful:

   (i) the right to return to the country of residence,
   (ii) the right to work freely without restrictions,
   (iii) the right to study, and
   (iv) full access to social services in the country of residence.

   If the claimant has some sort of temporary status which must be renewed, and which could be cancelled, or if the claimant does not have the right to return to the country of residence, the claimant should not be excluded under Article 1 E. [section 10.1.2.]

Shamlou, Pasha v. M.C.I.
(F.C.T.D., no. IMM-4967-94), Teitelbaum, November 15, 1995.

4. The case law seems to suggest that the CRDD should consider whether the claimant has a well-founded fear of persecution for a Convention reason in the Article 1E country. [section 10.1.3.]

Kroon, Victor v. M.E.I.
(F.C.T.D., no. IMM-3161-93), MacKay, January 6, 1995.

II. Article 1F

1. If there are "serious reasons for considering" that a claimant has committed an Article 1F crime (crime against peace, war crime, crime against humanity, serious non-political crime, act contrary to the purposes and principles of the United Nations), he or she is excluded from the Convention refugee definition.

Article 1 F of the *Convention Relating to the Status of Refugees*,
Schedule to the *Immigration Act*

2. The burden of establishing "serious reasons for considering" that Article 1F offences have been committed falls on the Minister, however the Minister does not have to be present at the hearing in order for the CRDD to consider exclusion. [section 10.5.]

Ramirez v. Canada (Minister of Employment and Immigration),
[1991] 2 F.C. 306 (C.A.).

3. There is no requirement to balance the nature of the Article 1F crime with the degree of persecution feared. [section 10.2.4.]

M.C.I. v. Malouf, François
(F.C.A., no. A-19-95), Hugessen, Décary, Robertson, November 9, 1995.

4. For a crime to be a crime against humanity, it must be committed in a widespread, systematic fashion either during a civil or international war or in times of peace. (section 10.2.3.)

Sivakumar v. Canada (Minister of Employment and Immigration),
[1994] 1 F.C. 433 (C.A.).

5. There may be circumstances where a claimant will invoke successfully certain defences, such as duress and superior orders, which absolve him or her from responsibility and thus the claimant will not be excluded from refugee status. [section 10.2.5.]

6. Where a claimant has not in a "physical" sense committed an Article 1F(a) crime, he or she may be held responsible for the crime as an accomplice and thus be subject to being excluded. In order to find the claimant complicit, the CRDD must determine that the claimant had "personal and knowing participation". [section 10.2.6.]

Ramirez, supra.

7. Mere membership in an organization principally directed to a limited brutal purpose does not automatically result in exclusion; the CRDD must first determine whether the claimant had knowledge of the crimes being committed by the members of the organization. [section 10.2.6.1.]

Ramirez, supra;
Saridag, Ahmet v. M.E.I.

(F.C.T.D., no. IMM-5691-93), McKeown, October 5, 1994.

8. In order for a crime to be characterized as "political", thus falling outside the ambit of Article 1F(b) (serious non-political crimes), both aspects of a two-pronged test must be satisfied:

   (i) the existence of a political disturbance related to a struggle to modify or abolish a government or government policy;

   (ii) a rational nexus between the crime committed and the accomplishment of the political objective sought. [section 10.3.2.]

Gil v. Canada (Minister of Employment and Immigration), [1995] 1 F.C. 508 (C.A.).

9. A very serious crime may be accepted as "political" if the regime against which it is committed is repressive and offers no scope for freedom of expression and the peaceful change of government or government policy. [section 10.3.2.]

Gil, supra.

10. The purpose of Article 1 F(c) is to exclude those individuals responsible for serious, sustained or systematic violations of fundamental human rights which amount to persecution in a non-war situation. [section 10.4.]

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982.

11. The guiding principle is that where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes and principles of the United Nations, then Article 1 F(c) will be applicable. [section 10.4.]

Pushpanathan, supra.

12. Two categories of acts fall within Article 1 F(c):

   (i) where a widely accepted international agreement or United Nations resolution declares that the commission of certain acts is contrary to the purposes and principles of the United Nations;

   (ii) those acts which a court is able, for itself, to characterize as serious, sustained and systematic violations of fundamental human rights constituting persecution. [section 10.4.]

Pushpanathan, supra.

13. The application of Article 1F(c) is not limited to persons in power. Non-state actors may fall within the provision. [section 10.4.]

Pushpanathan, supra.

Immigration and Refugee Board / La Commission de l'immigration et du statut de réfugié

MEMORANDUM NOTE DE SERVICE

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ORIGINATOR/AUTEUR P Auron
SUPERVISOR/SURVEILLANT P. Wall
DATE May 17, 2000/le 17 mai 2000

To/à: Chairperson; Deputy Chairperson; CRDD; ADC; PDB; All CRDD Members and RCOs
Président; Vice-président; SSR; DGPP; tous les membres du SSR et ACR

From/de: Philip Palmer
Senior General Counsel/
Avocat général principal
Director of Legal Services/
Directeur, Services juridiques

Subject/Objet: **Interpretation of the Convention Refugee Definition in the Case Law**
La jurisprudence sur la définition de réfugié au sens de la Convention

Attached please find the updated Convention Refugee Definition Paper, dated December 31, 1999, prepared by Legal Services. The electronic version is available in SHARENET and in the IRB's website.

Vous trouverez ci-joint la nouvelle version de « La jurisprudence sur la définition de réfugié au sens de la Convention », datée du 31 décembre 1999, qui est l'oeuvre des Services juridiques. La version électronique se trouve dans SHARENet et sur le site web de la CISR.

This update replaces the previous version of the paper in its entirety. It incorporates the previous addenda and case law up to December 31, 1999. The previous paper and the addenda should be discarded.

La présente version remplace entièrement la précédente. On y a incorporé les addenda antérieurs et la jurisprudence au 31 décembre 1999. Prière d'éliminer la version précédente et les addenda.

A new feature in this update is the inclusion of a document entitled "Key Points", which is a compilation of the main principles of each of the chapters.

La mise à jour comprend une nouveauté, à savoir le document intitulé «Points saillants», qui regroupe les grands principes énoncés dans chaque chapitre.

Canada

The following Legal Advisers contributed to the update of the paper: Richard Tyndorf (chapters 2, 7, and the section on Article 1 E in chapter 10); Denis Bordeleau (chapter 3); Linda Koch (chapter 4); François Guilbault (chapter 5); Lori Disenhouse (chapter 8); Gordon Hayhurst (chapter 9); Nancy Weisman (Article 1 F in chapter 10); and Patricia Auron (chapter 1, 6, the Key Points document, and the overall editing of the entire paper).

Les conseillers juridiques suivants ont participé à la mise à jour : Richard Tyndorf (chapitres 2 et 7 et la section portant sur l'article 1 E du chapitre 10); Denis Bordeleau (chapitre 3); Linda Koch (chapitre 4); François Guilbault (chapitre 5); Lori Disenhouse (chapitre 8); Gordon Hayhurst (chapitre 9); Nancy Weisman (Article 1 F du chapitre 10); enfin, Patricia Auron (chapitres 1 et 6, les « Points saillants » et la révision intégrale du document.

I trust that you will find this update useful. If you have any comments about the format or the content of the paper, please forward them to Patricia Auron, Legal Adviser, Vancouver.

Je suis persuadé que la présente mise à jour vous sera utile et vous engage à communiquer tout commentaire sur le fond ou la présentation à Patricia Auron, conseillère juridique à Vancouver.

The next update, in the form of an addendum, will cover the jurisprudence released by the Courts up to December 31, 2000 and is scheduled for the spring of 2001.

La prochaine mise à jour, qui se fera sous forme d'addendum, visera la jurisprudence des tribunaux au 31 décembre 2000, et sa parution est prévue pour le printemps 2001.

Original signed by/original signé par

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Philip Palmer
Senior General Counsel/Avocat général princiapl
Director, Legal Services/Directeur des services juridiques